In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-536

NASHVILLE GAS COMPANY,
Petitioner,

vs.

NORA D. SATTY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

Table of Authorities

Cases

REGULATIONS AND STATUTES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nashville Gas Company petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Opinion of the District Court (Appendix A, *infra*, pp. A1-A16) is reported at 384 F. Supp. 765. The Opinion of the Court of Appeals (Appendix B, *infra*, pp. A17-A25) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1975 (Appendix C, *infra*, p. A26). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the disparity between the treatment of pregnancy and other disabilities by an employer constitutes discrimination on the basis of sex within the prohibition of Title VII of the Civil Rights Act of 1964.

STATUTES INVOLVED

The relevant provisions of Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a)(1), provide as follows:

> "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . ."

STATEMENT OF THE CASE

This case presents similar significant questions in the administration of Title VII of the Civil Rights Act of 1964, as *Liberty Mutual Insurance Company* v. *Wetzel*, 511 F.2d 199 (3d Cir. 1975), in which this Court recently has granted Certiorari (No. 74-1245, May 27, 1975). The question is whether the treatment of pregnant employees under a private employer's employment policies differently from other employees suffering from a non-work related disability constitutes sex discrimination under Title VII. Although this Court has recently held in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) that the exclusion of normal pregnancy from a State administered disability benefits plan did not constitute discrimination based on sex, it has not expressly held that such treatment is not discrimination based on sex under Title VII as well.

Nashville Gas Company does not have a disability insurance plan for its employees but does provide a specified number of sick leave days based on the employee's seniority. Pregnant employees who go on maternity leave do not receive any accumulated sick pay but are paid accumulated vacation time. An employee who has been on maternity leave and who wants to return to work does not retain any of her previously accumulated seniority for the purpose of bidding on permanent job openings although she is given priority over non-employees. Once she returns to permanent employment, she retains the seniority she had previously accumulated for purposes of pension, vacation, etc.

On September 13, 1973, Respondent filed charges with the Equal Employment Opportunity Commission ("EEOC"), claiming that Nashville Gas Company's failure

to provide pregnant employees the same treatment that it provided other employees suffering from temporary non-work related disabilities constituted discrimination based on sex in violation of Title VII. Respondent received a "Notice of Right to Sue" letter from the EEOC on April 5, 1974 and brought a class action in the District Court in timely fashion. The parties subsequently stipulated that the number of persons whom Respondent could properly represent was not so numerous that the action could be maintained as a class action under Rule 23, Fed. R. Civ. P.

The District Court held that Nashville Gas Company violated Title VII by denying sick leave pay to Plaintiff while she was on maternity leave since it granted sick leave pay to employees absent due to illness or other non-work related disabilities. The District Court also held that although the Company was justified in not holding Plaintiff's job open for her while she was on maternity leave, its policy of not permitting her to retain her previously accumulated seniority for job bidding purposes was unlawful discrimination. The District Court rejected Plaintiff's contentions that payment of maternity benefits under the Company's group health and hospitalization plan was discriminatory, that her being placed on pregnancy leave 25 days prior to the date on which her baby was born was unreasonable or arbitrary and that her subsequent termination was retaliatory.

The Sixth Circuit Court of Appeals affirmed the District Court's decision, and in doing so specifically rejected as inapplicable under Title VII this Court's decision in *Geduldig* v. *Aiello*.

REASONS FOR GRANTING THE WRIT

1. This case and those in five other Circuits, all involving the same basic question, raise a distinct issue of fundamental importance in the administration of Title VII.[1] This Court has granted certiorari in the *Liberty Mutual* case and petitions for certiorari are pending in the *American Telephone and Telegraph Company* and *General Electric Company* cases. In addition, numerous District Courts have addressed the issue.[2] The question is far from settled as to whether, under a private employer's employment policies, an employer discriminates by distinguishing between absences due to pregnancy and those attributable to temporary disabilities unrelated to pregnancy. For this reason alone, review by this Court is appropriate.

2. Such review is appropriate also because the decision below conflicts in principle with this Court's decision in *Aiello*. The Court there held that the equal protection clause of the Fourteenth Amendment did not require Cali-

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1. *See, Liberty Mutual Ins. Co.* v. *Wetzel*, 511 F.2d 199 (3d Cir. 1975); *Communication Workers of America, et al.* v. *American Telephone and Telegraph Co., Long Lines Dept.*, 379 F. Supp. 679, ... F.2d ..... (2d Cir., Mar. 26, 1975); *General Electric Co.* v. *Gilbert*, No. 74-1557, 4th Cir., *appeal docketed* May 15, 1974; *Holthaus* v. *Compton & Sons, Inc.*, ... F.2d ....., 10 FEP Cases 601 (8th Cir. 1975); *Hutchison* v. *Lake Oswego School District*, No. 74-3181, 9th Cir., *appeal docketed* Nov. 18, 1974.

2. *See, e.g., Vineyard* v. *Hollister School District*, 8 FEP Cases 1009 (D.C.Cal. 1974); *Zichy* v. *City of Philadelphia*, 10 FEP Cases 853 (D.C.Penn. 1975); *Sale* v. *Waverly-Shell Rock Bd. of Educ.*, 9 FEP Cases 138 (D.C.Iowa 1975); *Newmon* v. *Delta Airlines, Inc.*, 374 F. Supp. 238 (N.D.Ga. 1973); *CWA* v. *Illinois Bell Tel. Co.*, No. 73-C-959 (N.D.Ill., Filed April 13, 1973); *CWA* v. *Southern Bell Tel. & Tel. Co.*, No. 18328 (N.D.Ga., Filed May 17, 1973); *CWA* v. *New York Tel. Co.*, C.A. No. 73-3352 (S.D.N.Y., Filed July 31, 1973); *CWA* v. *The Pacific Tel. & Tel. Co.*, C.A. No. C-73-1739 RFP (N.D.Cal., Filed Sept. 28, 1973); *CWA* v. *South Central Bell Tel. Co.*, C.A. No. 73-1771 Section A (E.D.La., Filed July 5, 1973).

fornia to cover absences due to normal pregnancy under a State administered disability benefits plan. The court explicitly stated that the exclusion of pregnancy did not constitute discrimination on the basis of sex, observing (417 U.S. at 496-7) that "there is no risk in which men are protected and women are not." The Court added (417 U.S. at 496, n. 20):

> "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second group includes members of both sexes."

It is patently clear that the Court in *Geduldig* rejected the idea that to treat pregnancy differently under one's employment policies is sex discrimination when one analyzes the dissent of Mr. Justice Brennan in which he states:

> "Such dissimilar treatment of men and women on the basis of physical characteristics inextricably linked to one sex inevitably constitutes sex discrimination." 417 U.S. at *501*.

As indicated above, the majority directly rejected Mr. Justice Brennan's contention on this point.

It is obvious that the decision in *Aiello* cannot be dismissed as one in which the discrimination was lawful because it was justifiable under traditional Fourteenth Amendment standards. The Court went further than that in *Aiello*. It concluded in unmistakable terms that the exclusion of normal pregnancy from a disability benefits plan does not constitute sex based discrimination—a conclusion which is as valid under Title VII as under the

Fourteenth Amendment. The Court below and the Third Circuit Court of Appeals in *Liberty Mutual* have concluded otherwise, holding that such an exclusion does constitute sex based discrimination for purposes of Title VII. The conflict is ripe for resolution at this time, as the Court has already recognized by granting certiorari in *Liberty Mutual*.

3. There are no distinctions between *Liberty Mutual* and this case that would justify a difference in the treatment of the two petitions. The cases arise under the same statute and in the same context, and present the same basic issue. Furthermore, the reasoning of the two Courts also is identical in all significant aspects. The Circuits have also sought to justify the results they reach by relying on EEOC guidelines (29 C.F.R. §1604.10(b)) to the effect that the exclusion of normal pregnancy from a disability plan constitutes sex based discrimination in violation of Title VII. These guidelines were issued before this Court declared in *Aiello*, 417 U.S. at 496-7, n. 20 that the exclusion of normal pregnancy is not sex discrimination "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other. . . ."

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted. In the alternative, the Court should hold the Petition pending the ultimate disposition of *Liberty Mutual*.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 74-288-NA-CV

NORA D. SATTY

v.

NASHVILLE GAS COMPANY

Memorandum

(Filed November 4, 1974)

This cause of action was brought pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e, et seq.) alleging sex discrimination in defendant's employment policies with respect to pregnancy. Plaintiff seeks back wages, lost benefits, attorney's fees and injunctive relief. Plaintiff further alleges that her employment was terminated because she complained about the allegedly discriminatory policies.

There is no dispute as to the jurisdiction of this court under Title VII of the Civil Rights Act of 1964.

Originally the cause was brought as a class action. However, the parties stipulated that the number of persons whom plaintiff may properly represent is not sufficiently numerous to permit maintenance of a class action under Rule 23, Federal Rules of Civil Procedure.

Simultaneously with filing of this action, plaintiff filed a motion for entry of a preliminary injunction requiring defendant to reinstate her as an employee and enjoining defendant from retaliatory measures. A hearing was held upon plaintiff's motion on July 10, 1974. At the close of the hearing, the court determined that a preliminary injunction would not be issued because plaintiff failed to establish that irreparable harm would be suffered by denial of the motion and it appeared that monetary damages could compensate plaintiff for any injury she might suffer.

The threshold question is whether or not defendant's employment policies, with respect to pregnancy, constitute unlawful sex discrimination.

I.

The parties have stipulated as to the following statement describing defendant's policy of health insurance:

> As a condition of employment, every employee of Nashville Gas Company is required to be covered under a group life, health and accident policy issued by Provident Life and Accident Insurance Company. The cost of such policy is borne half by the Company and half by the employees. In addition to other health and hospitalization benefits, said policy also provides for payment of 50% of the customary and reasonable fees incurred in connection with pregnancy. Such pregnancy benefits apply to female employees and dependent wives of male employees. Although the insurance plan terminates with respect to an employee at the time such employee's active employment ceases, the maternity benefits continue to apply for up to nine months after termination and if such benefits would have been payable had delivery occurred on the date such active employment ceases.

Plaintiff's theory is that defendant's group insurance program discriminates on the basis of sex because a reduced benefit is paid in the case of pregnancy when compared with hospitalizations for other causes. There is no doubt that the insurance program makes a distinction in the case of pregnancy as to the extent of benefits available. However, the pregnancy distinction applies to both male and female employee-beneficiaries of the plan. The insurance proceeds are paid on behalf of the employee, male or female, according to a single formula in all pregnancy cases. Thus, for a male employee whose wife is pregnant, the insurance benefit is the same as provided to a pregnant female employee such as plaintiff.

The parties further stipulated that pregnancy is a temporary disabling condition resulting from a normal bodily function. In this case the plaintiff had a normal pregnancy and childbirth. Also, the parties have agreed that defendant does not have a disability insurance plan for its employees. This is not a situation where a female employee receives a lesser benefit for her disability than those received by males. Defendant's insurance plan pays no benefit whatsoever for disabilities. The only benefit under defendant's insurance plan is for payment of medical expenses. The issue in this case is whether defendant's insurance program discriminates unlawfully between male and female employees in the payment of medical expenses.

No evidence has been introduced to show a failure on defendant's part to comply with the Equal Employment Opportunity Commission guidelines on fringe benefits. Title 29, Code of Federal Regulations, Section 1604.9(d) provides:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and

families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not available for female employees; or to make available benefits to the husbands of female employees which are not available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

So far as the issue relating to the insurance program is concerned, the court finds no distinction in the application, operation, or effect of the insurance plan to support a finding of unlawful discrimination by reason of sex since all employees, male or female, receive the same benefit.

II.

It has been and is now the policy of defendant to require pregnant employees to take maternity leave. Although defendant's "Employee Policy Manual," of September 27, 1971, presents availability of maternity leave in permissive terms, to wit:

> In case of pregnancy, an employee, upon written request *may* be granted a leave of absence. . . (emphasis added)

actual practice demonstrates that a pregnant employee may not decline to accept maternity leave, and still retain employee affiliation with the defendant company. Once an employee is placed in maternity leave status, she may remain in that status for up to one year. There is no statement of policy concerning the status of an employee

on maternity leave who is unable to return to work after one year. A fair inference is that such an employee would be terminated.

Once an employee is classified as being in a leave status, i.e., leave of absence or pregnancy leave, it is defendant's policy to offer such an employee temporary work, when available, until a permanent position is open. After an employee returns from leave status and acquires permanent employment, the defendant credits such person with seniority previously accumulated for the purposes of pension, vacation, and other employee benefits based on seniority. However, defendant does not credit an employee returning from leave status who is subsequently classified as a temporary or permanent employee with previously accumulated seniority for the purpose of bidding on job openings. The significance of this policy is illustrated in the present case where plaintiff returned from pregnancy leave as a temporary employee after more than four (4) years of continuous employment, next preceding maternity leave, and defendant failed to place her in one of several permanent job openings. All of these openings were filled by other employees credited with greater job-bidding seniority even though plaintiff had the earlier date of initial employment. It appears that seniority is the primary factor in the job bidding process and failure to credit plaintiff with seniority for this purpose is the sole reason she failed to gain a permanent position with defendant following her return from maternity leave.

Defendant asserts that the job bidding policies are the same for all employees, male or female, returning from a leave status.

The gravamen to defendant's contention is that only pregnant women are required to take leave. In all cases

other than maternity the decision to take leave is entirely a voluntary matter with each employee.

It further appears that defendant maintains a policy of allowing leave in connection with non-work related illness or injury without loss of seniority or other indicia of good standing on the part of an employee where the non-work related disability does not concern pregnancy. It is only in the case of pregnancy that an employee is denied the opportunity to take "sick leave."

Defendant does not have a disability insurance plan for its employees, but does provide a specific number of sick leave days based on the employee's seniority. Employees, like plaintiff, who are placed on pregnancy leave are not paid for accumulated sick leave, but are paid for accumulated vacation time. Defendant's policy has been to allow employees who have been absent due to illness or non-work related disabilities to take "sick leave." Only in the case of pregnancy is an employee denied the right to take sick leave. It further appears that employees returning from long period of absence due to non-job related injuries do not lose their seniority and in fact their seniority continues to accumulate while absent.

Defendant asserts that the classification of employees as pregnant employees and non-pregnant employees for application of the aforementioned policies does not constitute unlawful sex discrimination under Title VII. Defendant acknowledges that a number of court decisions under Title VII, and the position of the Equal Employment Opportunity Commission, indicate that policies affording different treatment for temporary disability due to pregnancy than for all other non-work related disabilities is discrimination based on sex. However, it is asserted that the recent United States Supreme Court decision in *Geduldig* v. *Aiello*, ... U.S. ....., 41 L.Ed.2d 256, ... S.Ct. .....

(1974), determined that disparity of treatment between pregnancy related disability and other disabilities does not constitute sex discrimination. The primary source for defendant's argument is found in footnote 20 to the Court's opinion.

If defendant's reliance on the *Geduldig* decision were proper, then it would not be necessary to consider other cases in this area. For the reasons stated below, the court concludes that defendant's reliance on the *Geduldig* decision is not well founded.

In *Geduldig* the sole question presented was whether classifications under a disability insurance program established and administered under the laws of California violated the Equal Protection Clause of the Fourteenth Amendment. The asserted constitutional violation was based on the exclusion of disabilities in connection with normal pregnancies from coverage under the insurance program. The United States Supreme Court held that the exclusion of normal pregnancies from benefit coverage did not involve improper state action. The standard applied by the Court to test the constitutional question was one of "reasonableness." There was no question concerning the legitimacy of the state's action in establishing the disability insurance program to supplement the workman's compensation program. The analytic key to the *Geduldig* decision is found in the following language:

> This Court has held that, consistently with the Equal Protection Clause, a State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others . . ." * * * Particularly with respect to social welfare programs, *so long as the line drawn by the State is rationally sup-*

portable, the courts will not interpose their judgment as to the appropriate stopping point. "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." * * *. (41 L.Ed.2d 256, 263-264. [emphasis added])

In finding a rational basis for the exclusion of normal pregnancies under the California disability insurance program, the Court noted several factors relating to the fiscal soundness of the program which were found sufficient.

It should be noted that *Geduldig* did not involve an assertion of unlawful action under the Civil Rights Act of 1964. The plaintiff in *Geduldig* was not an employee nor prospective employee claiming unlawful discrimination by reason of the State's employment practices. The question of whether the California disability insurance program sufficiently affects interstate commerce so as to be subject to the Civil Rights Act of 1964 does not appear to have been litigated.

In discussing the rational basis of California's exclusion of pregnancy benefits, the Court referred to the cases of *Reed* v. *Reed*, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251, and *Frontiero* v. *Richardson*, 411 U.S. 677, 36 L.Ed.2d 583, 93 S.Ct. 1764. Both of these cases were brought under the Equal Protection Clause of the Fourteenth Amendment and in each case the Court found there was no rational basis for discrimination. In the *Reed* case the Court found a provision of the Idaho Probate Code giving preference to males in appointment of administrators to be violative of the Equal Protection Clause. Writing for the Court, the Chief Justice stated the test to be applied in Equal Protection type cases:

> . . . [T]his Court has consistently recognized that the Fourteenth Amendment does not deny to States the

> power to treat different classes of persons in different ways. * * * The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (30 L.Ed.2d 225, 229).

In the final analysis the Court concluded that the Idaho statute had no rationale sufficient to sustain the different classifications established for men and women.

In the *Frontiero* decision the Court again found there was no rational basis for the distinction drawn in the payment of benefits between male and female members of the military services.

The standard applicable to state action under the Equal Protection Clause of the Fourteenth Amendment is distinct from the lawful power of Congress to establish different standards for conduct affecting interstate commerce. Under the Commerce Clause the Congress has plenary power to regulate all aspects of interstate commerce. *Gibbons* v. *Ogden*, 9 Wheat (22 U.S.) 1, 6 L.Ed. (1824); *United States* v. *Darby*, 312 U.S. 100, 85 L.Ed. 609, 61 S.Ct. 473 (1941); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 13 L.Ed.2d 258, 85 S.Ct. 348 (1964); *Maryland* v. *Wirtz*, 392 U.S. 193, 20 L.Ed.2d 1020, 88 S.Ct. 2017 (1968). In effect Congress has established a standard for testing employment discrimination that goes beyond the standard of "reasonableness" traditionally applied to the States under the Equal Protection Clause of the Fourteenth Amendment.

To further illustrate the distinction between the two standards of permissible discrimination, it is helpful to consider the legislative history of Title VII. Title 42 U.S.C. Sec. 2000e, et seq. presents the standard to be applied in cases of employment discrimination. In 1972 Congress amended Title VII by deleting a portion of 42 U.S.C. Sec. 2000e(c) which originally provided:

> . . . but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance. . .

The effect of the 1972 amendment was to broaden the scope of Title VII and extend the employment standard to the States.

The case of *Maryland* v. *Wirtz, supra,* demonstrates the power of Congress under the Commerce Clause to prescribe the standard against which conduct will be gauged if that conduct affects interstate commerce. In noting that States are susceptible to the congressionally prescribed standards, the Court stated:

> But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulations. (20 L.Ed.2d 1020, 1031)

The congressional standard to be applied under the Civil Rights Act of 1964 is stated in 42 U.S.C. Sec. 2000e-2 for those cases alleging discriminatory employment prac-

tices. The only exception to the standard that could have relevance in the instant case is found in 42 U.S.C. Sec. 2000e-2(e)(1) which provides that a classification based on sex, etc., is permissible *if* there is:

> . . . a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . .

In light of the *Maryland* v. *Wirtz* decision, *supra,* it would appear that the proper standard to be applied in all employment discrimination cases properly brought under Title VII is the congressionally mandated standard outlined above.

All sex discrimination cases do not fall within the same category. As this discussion has illustrated, there are at least two classifications of sex discrimination cases: those arising under the Equal Protection Clause of the Fourteenth Amendment and those arising under Title VII of the Civil Rights Act of 1964. These two categories involve the application of different standards for the determination of whether distinctions based on sex are permissible. Under the Equal Protection Clause there need be only a "reasonable basis" for the legislative determination. However, under the Civil Rights Act of 1964, there must be an actual business necessity for employment policies that discriminate on the basis of sex. See *Moody* v. *Albemarle Paper Co.,* 474 F.2d 134 (4th Cir. 1973); *Diaz* v. *Pan American World Airways, Inc.,* 442 F.2d 385 (5th Cir. 1971); *Williams* v. *American St. Gobain Corp.,* 447 F.2d 561 (10th Cir. 1971).

The *Geduldig* case was brought under the Equal Protection Clause and not under Title VII. Thus, the standard involved was one of legislative reasonableness. Since *Geduldig* was not an employment case, it would be im-

proper to draw a negative inference as to the power of Congress to establish a different standard of permissible discrimination for employers admittedly affecting interstate commerce.[1] For these reasons, defendant's contention that *Geduldig* controls in the instant case is rejected.

In the opinion of this court, defendant's employment practices are discriminatory in the following respects: (1) only pregnant women are required to take leave and thereby lose job bidding seniority and no leave is required in other non-work related disabilities; and (2) only pregnant women are denied sick leave benefits while in all other cases of non-work related disability sick leave benefits are available. *Dessenberg* v. *American Metal Founding Co.*, 8 FEP Cases, 291 (D.C. Ohio); *Hutchison* v. *Lake Oswego School District*, 374 F.Supp. 1056 (1974); *Gilbert* v. *General Electric Co.*, 375 F.Supp. 367 (1974). Defendant has introduced no proof of any business necessity in support of these discriminatory policies. The court must therefore assume no justification exists.

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1. In *Geduldig* the minority opinion indicates a willingness to impose the congressional standard manifest in Title VII as the appropriate test under the Equal Protection Clause. The minority opinion further indicates a willingness to find State classifications based on sex to be unconstitutional *per se*. However, the majority opinion expressly relies on the "rational basis" formula as set forth in the traditional line of cases under the Equal Protection Clause. The dispute within the Court in *Geduldig* does not appear to be whether California's statute discriminates on the basis of sex, but rather the dispute focuses on whether that discrimination is permissible under the Fourteenth Amendment, i.e., it is a question of legislative reasonableness. The dissenting opinion ultimately rests on the conclusion that the State lacked a rational basis for the distinctions drawn. References to the provisions of Title VII and Equal Employment Commission decisions and regulations by the minority appear to furnish fuel for the proposition that the standard of reasonableness under the Equal Protection Clause should be strengthened to conform with the congressional statement of policy. Rejection of that argument by the majority does not rationally suggest that the standard established under Title VII is weakened or in anyway diminished in a case properly brought under the Civil Rights Act of 1964.

III.

Plaintiff further alleges that defendant's action in not holding her job open for her while she was on pregnancy leave constitutes discrimination based on sex. This allegation must be considered in light of certain business factors.

Plaintiff's principal duties prior to being placed on maternity leave involved the posting of merchandise accounts. It appears that defendant was considering prior to plaintiff's pregnancy, and has now initiated, the transfer of certain accounting functions to its computer processing department. Further, defendant has undertaken to discontinue its merchandise business. Both of these factors suggest a legitimate basis for the decision not to hold plaintiff's job open in the accounting department. The court discerns no discriminatory conduct by defendant with reference to this issue.

IV.

It is further asserted that defendant's action in requiring plaintiff to begin her pregnancy leave on December 29, 1972, was arbitrary and in violation of Title VII.

Although defendant's "Employee Policy Manual" suggests that pregnancy leave commence during the fourth month, actual practice shows that no set time is arbitrarily established to determine when leave shall be taken. Defendant's Vice President-Personnel has stated that several factors are weighed when reaching the decision to start pregnancy leave. These factors include: the opinion of the employee's doctor; the employee's duties; work area; and degree of public contact. Although the Vice President-Personnel was to be the final judge of when these factors should dictate the commencement of leave, there is no showing of abuse in reaching that decision.

Following employee holidays on Friday, December 22, and Monday, December 25, 1972, plaintiff failed to report for work on the next four consecutive work days. The proof shows that she was having a problem with water retention at that time and that she also had a common cold. After being placed on maternity leave on December 29, 1972, plaintiff gave birth to her child on January 23, 1973, some twenty-five days after maternity leave had commenced.

It is of paramount significance that defendant's policies as actually practiced do not fix an arbitrary month or date on which pregnancy leave must begin. The facts in each situation are considered on an individual basis. Given plaintiff's problem with water retention and the subsequent birth of her child on the 25th day of maternity leave, defendant's action does not appear to be arbitrary or irrational. See *Cleveland Board of Ed.* v. *LaFleur*, 414 U.S. 632, 39 L.Ed.2d 52, 94 S.Ct. 791 (1974).

V.

A further issue in this cause is whether the termination of plaintiff's temporary employment on April 13, 1973, was in retaliation for her complaining about defendant's employment policies with respect to pregnancy.

Plaintiff returned to work with defendant as a temporary employee on March 14, 1973. It was defendant's policy to place women returning from maternity leave in available temporary positions until a permanent opening was awarded on the basis of job bidding. Plaintiff worked as a temporary employee until April 13, 1973, when the temporary project to which she was assigned was completed. Plaintiff continued to apply for permanent job positions but was frustrated in her efforts by those policies

causing her to loose credit for accumulated seniority in job bidding. The court finds no evidence of retaliatory termination of plaintiff for assertion of her civil rights. However, it is clear that plaintiff's termination request was the result of her inability to retain permanent employment following forfeiture of her job bidding seniority rights by defendant.

VI.

The court concludes that plaintiff is entitled to the following relief:

1. Recovery of sick leave benefits that should have been paid during her maternity leave. Plaintiff is also entitled to have sick leave benefits credited and accumulated from the time she returned from maternity leave on March 14, 1973.

2. Back wages from March 14, 1973, until the present. The back wages shall be computed on the rate of pay earned by plaintiff on December 29, 1972, plus any across the board increases which may have occurred since that time. However, back pay will be reduced by amounts paid for temporary work with defendant, unemployment compensation received from the State of Tennessee, and wages from other employment.

3. Reinstatement as a permanent employee as of the date that the first permanent position after March 14, 1973, was filled with another employee having less seniority than plaintiff. Plaintiff will be credited with full seniority from the date of her initial hiring by defendant.

4. Recovery of reasonable attorney's fees.

The court authorizes the defendant to submit affidavits concerning plaintiff's status upon reinstatement. If there

has been a reduction in force by defendant which would have caused plaintiff's termination sometime after March 14, 1973, based on seniority computed from the date of her initial hiring, that fact may be shown to properly adjust the relief awarded plaintiff. Such affidavits should also reflect applicable "bumping" procedures, if any, to clarify whether or not plaintiff would have been entitled to a lesser position in defendant's company. Defendant may submit other data relating to the entitlement of plaintiff under the terms of this memorandum. However, defendant shall furnish copies of such affidavits to plaintiff's counsel and plaintiff shall have an opportunity to respond. The court will review such affidavits as are submitted relative to the determination of plaintiff's reinstatement and back wages, and if any material issue of fact is presented, a further hearing will be ordered on that matter. Defendant is allowed fifteen (15) days for the submission of affidavits and plaintiff shall have ten (10) days following defendant's submission to file counter-affidavits.

Counsel for plaintiff will submit an order consistent with the provisions of this memorandum.

/s/ L. Clure Morton
United States District Judge

APPENDIX B

No. 75-1083

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORA D. SATTY,
Plaintiff-Appellee,

v.

NASHVILLE GAS COMPANY,
Defendant-Appellant.

AN APPEAL from the United States District Court for the Middle District of Tennessee.

Decided and Filed August 8, 1975.

Before: MILLER and ENGEL,* Circuit Judges, and TAYLOR,** District Judge.

TAYLOR, District Judge. After exhausting her remedies through the Equal Employment Opportunity Commission, this action was initiated by Nora Satty against the Nashville Gas Company for alleged sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The District Court after hearing testimony from plaintiff denied her motion for a temporary injunction but thereafter on November 4, 1974 awarded reinstatement with seniority, back pay, including sick

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*Judge Engel did not participate in the consideration of this decision.

**The Honorable Robert L. Taylor, United States District Judge for the Eastern District of Tennessee, sitting by designation.

leave, and attorney fees. For the reasons set forth below, we affirm.

Undisputed, the facts are relatively simple. Plaintiff was initially hired by Nashville Gas as a junior clerk in the customer accounting department on March 24, 1969, and was later promoted to clerk on December 2, 1969. Having previously informed her employer in August 1972 of her pregnancy, she was placed on maternity leave on December 29, 1972, pursuant to the request of the vice-president in charge of personnel. Plaintiff's child was born twenty-five days later on January 23, 1973. Under Nashville Gas' policy, an employee can be granted pregnancy leave for a period of up to one year. Following the child's birth and after a six week checkup the employee is permitted to return to full time status when a permanent position becomes available and when the opening is not bid on by a permanent employee. During the interim between the six week checkup and reemployment on a permanent basis, Nashville Gas attempts to provide the employee with temporary work. As a consequence of this policy, the employee who is placed on pregnancy leave, unlike the male employee who is absent due to a nonwork-related disability, loses her accumulated seniority for job bidding purposes but otherwise retains her accrued vacation and pension seniority. Similarly, while the employee is permitted to apply her accumulated vacation time to her absence during pregnancy, sick leave may not be applied to a pregnancy-related absence. It is these latter two specific policies that are the object of plaintiff's attack.[1]

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1. Unlike *Gilbert* v. *General Electric Co.*, No. 74-1557 (4th Cir., June 27, 1975); *Wetzel* v. *Liberty Mutual Insurance Co.*, No. 74-1233 (3rd Cir., Feb. 11, 1975) *cert. granted*, May 27, 1975, 43 U.S.L.W. 3621, and *Communications Workers of America* v. *American Telephone & Telegraph*, No. 74-2191, 2d Cir., Mar. 26, 1975), Nashville Gas has no disability income protection plan for its employees.

On March 14, 1973, plaintiff returned to work as a temporary employee and was paid $130.80 per week, as opposed to $140.80 she earned prior to her leaving in December, 1972; however, this temporary employment ended on April 13, 1973 when her job was completed. Thereafter, in order to collect unemployment compensation insurance, plaintiff requested Nashville Gas to change her employment status from pregnancy leave to complete termination. It was stipulated by the parties that between December 29, 1972 and May 10, 1973, plaintiff applied for three full-time positions with Nashville Gas which became available; however, in each case a permanent employee with job seniority was awarded the position. Had plaintiff retained her job bidding seniority, she would have been awarded the positions.

Against this background, the principal issue before the Court is whether Nashville Gas' pregnancy policy violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-5, as amended. In holding that defendant's policy is violative of the Civil Rights Act of 1964, we note that this question, as framed in the context of the impact of the Supreme Court's decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), is one of first impression in this Circuit. The same issue has been addressed in four other circuits.[2]

Central to the dispute here is the controlling impact of the Supreme Court's decision in *Aiello* and, more particularly, the weight of this Court should attribute to footnote 20 of that opinion. If *Aiello* and footnote 20 are dispositive of the issue whether a distinction between pregnancy related disabilities and other disabilities is sex based, then the threshold issue is easily resolved against

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2. *Gilbert* v. *General Electric Co., supra; Wetzel* v. *Liberty Mutual Insurance Co., supra; Communications Workers* v. *American T. & T. Co., supra; Holthaus* v. *Compton & Sons, Inc.*, No. 74-1655 (8th Cir. Apr. 10, 1975).

plaintiff. If however, *Aiello* is not viewed as dispositive, then the Court must proceed to consider alternative constructions.

Aiello

California, in establishing an employee supported disability insurance system for nonwork-related injuries, chose to exclude pregnancy-related disabilities from the scope of the program's operation. Four women who had experienced a period of pregnancy-related disability challenged their exclusion from the program's benefits, and a three-judge district court found such exclusion violated the Equal Protection Clause. However, Justice Stewart speaking for the majority, adopted the "rationally supportable" standard of justification,[3] and held that the state's legitimate interest in seeking to protect the program's financial integrity and self-supporting character allowed it to address "itself to the phase of the problem which seems most acute to the legislative mind . . ."[4] Thus, cast in terms of the administration of a social welfare program, under the Court's interpretation the line drawn by the California legislature was between pregnancy-related disabilities and other disabilities, not between male and female employees. The Court peripherally amplified in footnote 20 its basis for concluding that disability and not sex was the line drawn by California legislature:

> "The dissenting opinion to the contrary, this case is thus a far cry from cases like Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not ex-

3. 417 U.S., at 495.

4. *Id.* (citing *Williamson* v. *Lee Optical Co.* 348 U.S. 438, 489 (1955)).

> clude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed, supra, and Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, *lawmakers are constitutionally free* to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition."
>
> 417 U.S. at 496, n. 20 (emphasis added)

It is apparent from our reading of footnote 20 that the Court's observations are made in the particular and narrow confines of the state's power to draw flexible and pragmatic lines in the social welfare area. To conclude that the Court's footnote is dispositive of an action brought under Title VII would be to ignore the traditional doctrine that the precedential value of a decision should be limited to the four corners of the decisions's factual setting.[5] The reasoning and policy behind this doctrine is readily appreciated when *Aiello* is compared with the facts in this case. Here, the question is whether the exclusion by a private employer of pregnancy-related disabilities from its sick leave and se-

5. *Cohens* v. *Virginia*, 6 Wheaton (19 U.S.) 264, 399-400 (1821); *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132-133 (1944); *rehearing denied*, 323 U.S. 818 (1945). *Accord, Communications Workers of America* v. *American Telephone & Telegraph Co., supra*, slip opinion, at 2556-57.

niority program is a violation of a congressional statute, essentially, a dissimilar question from the issue before the *Aiello* Court—whether a legislative classification dividing disabilities into two classes for the purposes of a disability income protection program finds a rational basis. It is this very degree of dissimilarity that rejects a blind adherence to footnote 20. To import a different effect to footnote 20 would be to extend the impact of *Aiello* beyond its intended effect. It would appear harsh to read into footnote 20 that the Court expected, in passing on the propriety of a legislative classification under the Equal Protection Clause, to preclude all future discussion of statutory interpretation under a relatively new act such as the Civil Rights Act of 1964. Unless squarely faced with the Act, the Court has evidenced a reluctance to examine its parameters or the interpretive functions of the Equal Employment Opportunity Commission (E.E.O.C.).[6] While mindful of the Court's language in footnote 20, caution dictates that we not make it a talisman for Title VII actions.[7]

E.E.O.C. Guidelines

Turning from *Aiello* for guidance, it is logical that we should look to the agency charged with the administration of Title VII. In this regard, 29 C.F.R. § 1604.10(b) provides:

6. *See Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 640 n. 8, 653 n. 2 (Powell, J., concurring) (1974). In this vein, see also the remarks of Judge Bryan in *Communications Workers* v. *American Tel. & Telegraph Co., supra,* at footnote 11.

7. It is urged that because E.E.O.C. argued in its amicus brief in *Aiello* that the Court's holding would affect similar actions brought under Title VII and that because the Equal Protection issue was decided against the E.E.O.C., the Court intended its holding to extend to Title VII actions. Absent any reference at all to Title VII in *Aiello*, this argument if adopted, would impermissibly distort the principle of *stare decisis*.

"(b) Disabilities cause or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

We are urged in this case to reject the lessons of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring), which accord deference to the Commission's interpretation, under the authority of the Supreme Court's recent decision in *Esponoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 96 (1973). There, the Court, rejecting the Commission's regulation that discrimination on the basis of citizenship is tantamount to discrimination on the basis of national origin, noted that the agency had formerly held a different view, but, most importantly, the Court emphasized that "application of the guideline would be inconsistent with an obvious congressional intent . . ."[8] Unlike the situation before the Court in *Espinoza*, we do not have before us any legislative history indicating that the E.E.O.C. interpretation conflicts with the congressional intent. We are not in a position to say that the agency position con-

8. 414 U.S. at 94.

travenes the letter or spirit of the Act.[9] Thus, absent clear indicia in the form of legislative history that the agency interpretation is unreasonable or unnatural, we must defer to the Commission's construction of the statute as articulated under 29 C.F.R. § 1604.10(b).[10]

We note that in holding that disparate treatment between pregnancy leave and other sick leave constitutes a violation of Title VII, we reaffirm this Court's former decision in *Farkas* v. *Southwestern City School District*, 506 F.2d 1400 (6th Cir. 1974), where the District Court was affirmed and the conclusion reached that exclusion of normal pregnancy from a sick leave program constituted sex discrimination under Title VII. We are not persuaded that that position is incorrect. Though the legislative history of Title VII contains no explicit reference to sex discrimination, we learn from its declaration of policy that its principal aim was to eliminate artificial barriers that fostered disparate treatment, absent a compelling and founded reason for such disparity.

Appellant condents that the test of the validity of an employment policy under Title VII is not different from the test of validity under the Fourteenth Amendment.[11]

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9. It is similarly suggested that E.E.O.C.'s guidelines are in variance with the Wage and Hour Administrator's policy toward pregnancy under the Equal Pay Act, 29 U.S.C. § 206(d); 29 C.F.R. § 800.100, and the Office of Federal Contract Compliance's interpretation of Executive Order 11246, 3 C.F.R. 172, which permits a distinction to be drawn between pregnancy and other disabilities. However, here, we seek to interpret Title VII and not the Equal Pay Act or Executive Order 11246.

10. *Accord, Gilbert* v. *General Electric Co., supra; Wetzel* v. *Liberty Mutual Insurance Co., supra; Communications Workers of America* v. *American T.&T. Co., supra; Holthaus* v. *Compton, supra; Vineyard* v. *Hollister Elementary School District* 64 F.R.D. 580 (N.D.Cal. 1974).

11. *Accord, U. S.* v. *Chesterfield County School District*, 484 F.2d 70, 73 (4th Cir. 1973).

This argument, however, presupposes that the lawful scope of employment policies under the former Act is coextensive with the latter constitutional provision. We believe that the better approach permits Title VII under the Commerce Clause to extend beyond the reach of the Equal Protection Clause. *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294.[12] Otherwise, Title VII's effective reach would be limited by the decisions of the Supreme Court, a result effectively curtailing its implementation.

Relief

The District Court, finding that Nashville Gas' policy violated the provisions of 42 U.S.C. §2000e-5, ordered that plaintiff recover sick leave benefits that should have been paid during her maternity leave; back wages from March 14, 1973, including any across the board increases, and reduced by temporary wages and unemployment insurance; reinstatement with full seniority and recovery of reasonable attorney fees.

Under the guidelines of *Meadows* v. *Ford Motor Company*, 43 U.S.L.W. 2332 (1975), and *Head* v. *Timken Roller Bearing Company*, 486 F.2d 870 (6th Cir. 1973), we find the District Court's relief appropriate.

The judgment of the District Court is affirmed.

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12. *Accord, Communications Workers* v. *American Telephone & Telegraph*, slip opinion at 2562. *See also, Id.* at n. 12. It is submitted that an anomaly would exist if public and private employers were held to different standards under Title VII and the Fourteenth Amendment cases. It would appear, however, that any disparity would have been mitigated by inclusion of "governments" within the meaning of person under the 1972 Amendments. 42 U.S.C. § 2000e.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1083

NORA D. SATTY,
Plaintiff-Appellee,

v.

NASHVILLE GAS COMPANY,
Defendant-Appellant.

Before: MILLER and ENGEL, Circuit Judges, and TAYLOR, District Judge.

Judgment

(Filed August 8, 1975)

APPEAL from the United States District Court for the Middle District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

Entered by Order of the Court.

John P. Hehman, Clerk

By /s/ Grace Keller
Chief Deputy

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-536

NASHVILLE GAS COMPANY,
Petitioner,

vs.

NORA D. SATTY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 7, 1975
CERTIORARI GRANTED JANUARY 25, 1977

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 74-288-NA-CV

NORA D. SATTY,

vs.

NASHVILLE GAS COMPANY,
Defendant.

RELEVANT DOCKET ENTRIES

	Date of Filing
Complaint	July 1, 1974
Affidavit of Elmer L. Henson Jr.	July 9, 1974
Order	July 10, 1974
Employee Policy Manual, Sick Leave and Pregnancy Leave Sections	July 10, 1974
Schedule of Salary Rates	July 10, 1974
Handwritten Letter of May 10, 1973	July 10, 1974
Answer	July 22, 1974
Answers to Plaintiff's Interrogatories	August 23, 1974
Stipulation of Facts	August 27, 1974
Pre-Trial Order	August 28, 1974
Typed Letter of May 10, 1973	September 5, 1974
Memorandum	November 4, 1974
Stipulations	November 20, 1974
Order	November 20, 1974
Office Court Reporter's Transcript	December 23, 1974

(Caption Omitted)

COMPLAINT

(Filed July 1, 1974)

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1343(4) and 42 U.S.C. Section 2000 E-5 (F). This is a suit in equity authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964", 78 Stat. 253 (42 U.S.C. Section 2000 E *et seq.*), Public Law Number 92-261, 86 Stat. 103 (March 24, 1972), hereinafter referred to as "Title VII".

2. The unlawful employment practices alleged below were and are being committed within the Middle District of the State of Tennessee.

3. Plaintiff, Nora D. Satty, is a female citizen of the United States and a resident of Goodlettsville in the State of Tennessee. Plaintiff was employed by Defendant, Nashville Gas Company, on March 24, 1969 and was employed continuously from that date to December 29, 1972.

4. Defendant Nashville Gas Company is a corporation doing business in the State of Tennessee, in the City of Nashville. The Company operates and maintains plants and offices and is an employer within the meaning of Section 701(B) of Title VII in that the Company is engaged in an industry effecting commerce and employs and has employed the requisite number of persons during all relevant times.

5. Plaintiff brings this action on behalf of herself and all other female persons similarly situated pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class which Plaintiff represents is composed of female persons who are now employed, or who were employed, or

who might have become employed, or who might become employed by Nashville Gas Company at its plants or offices since July 2, 1965, and who have been, and continue to be or might be adversely effected by the practices complained of herein.

There are common questions of law in fact effecting the rights of the members of this class who are, were and continue to be limited, classified and discriminated against in ways which deprived them of equal employment opportunities and otherwise adversely affect their status as employees because of their sex. These common questions predominate over any questions effecting only individual members of this class. These persons are so numerous that joinder of all members is impractical. Common relief is sought. The interest of said class are adequately represented by Plaintiff. Defendants have acted or refused to act on grounds generally applicable to the class. The class action is superior to other available methods for the fair and efficient adjudication of this controversy.

6. A charge of Employment Discrimination was filed against the corporation Defendant on or about September 13, 1973 by Nora D. Satty, Plaintiff herein.

7. On April 5, 1974 Plaintiff received a "NOTICE OF RIGHT TO SUE" from the Birmingham District Office of the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, entitling her to institute a civil action in the appropriate Federal District Court within 90 days of the date of receipt of said notice.

8. On December 29, 1972, Plaintiff, Nora D. Satty, was forced to leave her employment with the Defendant on the instructions of Mr. Elmer Henson, Personnel Director of Defendant, because of her pregnancy, although Plaintiff's physician had not advised her to cease employment at that time.

9. During her absence due to her pregnancy, Plaintiff was not paid sick-pay benefits to which she would have been entitled if she had been absent due to other types of illnesses or disabilities pursuant to the Defendant's policy as stated in its Employee Policy Manual. Further, Plaintiff's expenses of pregnancy were not as fully covered by Defendant's group insurance policy as were other illnesses and disabilities.

10. On or about March 7, 1973, Plaintiff was asked to return to work for Defendant. Upon returning to her employment Plaintiff learned that she was no longer considered a full-time employee of Defendant but rather was considered a temporary employee. Further, Plaintiff learned that she would be paid at the rate of pay for beginning employees even though she was earning $17.00 per week more in seniority raises prior to December 29, 1972.

11. As a result of Plaintiff's being employed as a part-time employee, the Defendant failed and refused to consider her application for job openings for which she was qualified and to which she would have been entitled had not she lost her seniority as a result of her pregnancy.

12. When Plaintiff complained to Defendant about her status as a temporary employee and the failure of Defendant to place her in any full-time jobs for which she had applied, the Plaintiff was terminated as an employee of Defendant in violation of Section 704, Title VII.

13. The aforementioned practices of Defendant are in violation of Section 703, Title VII and the Defendant has followed and continues to follow its policy and practice of discrimination against its employees and applicants for employment because of their sex in violation of Section

703, Title VII. The discriminatory practices and policies include, but are not limited to, the following:

(a) Failing and refusing to hire females on an equal basis with men at a rate of pay equal to that paid to men;

(b) Establishing and maintaining job classifications which result in the exclusion of females because of their sex from jobs and job opportunities for which they are otherwise qualified and for which sex is not a bona fide occupational qualification;

(c) Failing and refusing to provide training for females because of their sex for positions for which sex is not a bona fide occupational qualification;

(d) Failing and refusing to promote females because of their sex to positions for which sex is not a bona fide occupational qualification;

(e) Failing and refusing to pay females on an equal basis with men for substantially equal work;

(f) Establishing and maintaining a sick leave plan which is applied to disability due to pregnancy, miscarriage, abortion, childbirth and recovery therefrom on different terms and conditions than are applied to other types of temporary disability.

(g) Establishing and maintaining written and unwritten policies which apply different terms and conditions to the maintenance and accrual of seniority during leave from employment due to pregnancy, miscarriage, abortion, childbirth and recovery therefrom than are applied to the maintenance and accrual of seniority during leave due to other types of temporary disability.

(h) Establishing and maintaining group health and temporary disability insurance plans which are applied to disability due to pregnancy, miscarriage, abortion, childbirth and recovery therefrom on different terms and conditions than are applied to other types of temporary disability.

(i) Establishing and maintaining a policy of a mandatory minimum period of leave from employment which is solely applied to disability due to pregnancy.

(j) Establishing and maintaining a policy of reinstating former full time employees on a part time basis upon their return to work from a disability due to pregnancy, miscarriage, abortion, childbirth and recovery therefrom while reinstating former full time employees on a full time basis upon their return from other types of disability.

(k) Establishing and maintaining a policy of the retaliatory dismissal of employees who assert their rights under Title VII.

(l) Failing and refusing to take affirmative actions to correct the effects of the discriminatory policies and practices complained of herein.

9. The effect of the policies and practices pursued by the defendant as alleged above have been and continue to be to limit, segregate, classify and discriminate against the female workers at Nashville Gas Company in ways which jeopardize the jobs of and continue to deprive the said female workers of employment opportunities otherwise adversely effect their status as employees because of their sex in violation of Title VII.

10. As a further result of the Defendants' above stated actions, the Plaintiff and the class she represents

who are employed or were employed or who might have been employed or might become employed by Defendant corporation have been and are being deprived of income in the form of wages and of prospective retirement benefits, social security and other benefits due to them as workers solely because of their sex in the sum to be proven at the trial.

In addition, Plaintiff and the class she represents have no plain, adequate or complete remedy at law to correct the practices alleged herein and this suit for injunctive relief is the only means of securing adequate relief. The Plaintiff and the class she represents are now suffering and will continue to suffer irreparable injury from the Defendants' policies, practices, customs, and usages as set forth herein.

11. Plaintiff is entitled to recover reasonable attorneys' fees for the services of her attorneys in these proceedings as provided for in Section 706 (k) of Title VII.

WHEREFORE, Plaintiff respectfully prays this Court to:

1. Grant Plaintiff a preliminary injunction requiring the Defendant to reinstate plaintiff as an employee with all her seniority rights and privileges and enjoining defendant, its officers, agents, successors, and employees, attorneys, assigns and other representatives, and all those acting in concert with it and at its direction from terminating Plaintiff's and the class she represents employment and from harassing her and the class she represents or from retaliating against her and the class she represents for asserting their rights under Title VII;

2. Grant Plaintiff and the class she represents a permanent injunction enjoining the Defendant Nashville Gas

Company, its officers, agents, successors, employees, attorneys, assigns and other representatives, and all those acting in concert with it and at its direction, from engaging in any employment policy or practice which discriminates against any employee or member or applicant for employment on the basis of sex;

3. Order defendant to make whole those persons adversely effected by the policies and practices described herein by providing appropriate back pay and reimbursement for lost sick leave pay, health and disability insurance benefits, pension, social security and other benefits in an amount to be shown at trial, and other affirmative relief including, but not limited to, an affirmative action program designed to eliminate the effects of the discriminatory practices complained of herein;

4. Retain jurisdiction over this action to assure full compliance with the orders of this Court and with Title VII and require Defendants to file such reports as the Court deems necessary to evaluate such compliance;

5. Grant Plaintiff and the class she represents, her attorneys' fees, costs, and disbursements; and

6. Grant such additional relief as the Court deems proper and just.

(Caption Omitted)

AFFIDAVIT OF ELMER L. HENSON, JR.

(Filed July 9, 1974)

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

Elmer L. Henson, Jr., being first duly sworn, deposes and says as follows:

I am Vice-President—Personnel of Nashville Gas Company (the "Company") and have been in charge of the personnel department of the Company since 1962. As such I have custody and control of the personnel records of all employees of the Company.

The plaintiff was hired by the Company as a junior clerk in the customer accounting department on March 24, 1969 and was promoted to clerk on December 22, 1969. She continued to hold that position until December 29, 1972 when she was placed on pregnancy leave.

At some point during the year 1972 after I became aware that plaintiff was pregnant, I discussed with her and two other female employees who were pregnant at the time the policy of the Company with respect to pregnancy leaves. At that time I told the plaintiff and the other two female employees that a decision as to when they should commence pregnancy leave would be based on their doctors' opinion, their duties with the Company, their work area, and degree of public contact, but that I was to have the final decision as to when pregnancy leave was to commence. I explained to the plaintiff and the other two female employees that I understood the importance to them of the income they were earning from

the Company but at the same time had to consider their welfare, the welfare of the unborn child and the welfare of the Company in determining when pregnancy leave should commence. Friday, December 22 and Monday, December 25 were Company holidays. After plaintiff failed to report for work on Tuesday, December 26, Wednesday, December 27, Thursday, December 28, and Friday, December 29, 1972, I directed her supervisor to request her to request pregnancy leave and pregnancy leave was granted commencing December 29, 1972. Plaintiff's child was born on January 23, 1973. The other two female employees were placed on leave one month and two days and one month and ten days before delivery of their respective children.

It has been and is now the policy of the Company to grant pregnancy leaves for up to one year. It is the policy of the Company to permit employees on pregnancy leave to return to permanent employment when there is an available position for which such employee is qualified and for which no person then permanently employed is bidding. Prior to such permanent employment becoming available it is the policy of the Company to give the employee on pregnancy leave temporary work for which she is qualified when such temporary work is available. An employee who has been on pregnancy leave and returns to permanent employment retains the seniority she had previously accumulated for purposes of pension, vacation, etc., but does not retain such seniority for the purpose of bidding on job openings.

During the time that I have been in charge of the personnel department of the Company, I am aware of only two male employees who have requested leaves of absence. The first male employee was granted a year's leave of absence to complete work for a college degree but he did

not seek to return to work at the end of his leave of absence. Another male employee is currently on leave to complete his education. If such employee seeks to return to work, he will be afforded the same treatment afforded female employees on pregnancy leave. Similarly if any other employee, male or female, were granted a leave of absence, such employee would be afforded the same treatment as that given to female employees on pregnancy leave.

At the time that the plaintiff was placed on pregnancy leave on December 29, 1972 she was earning $140.80 per week. Due to the fact that the Company was then contemplating converting certain of its accounting functions to a computer it was determined by her supervisor at the time she was placed on pregnancy leave that the position she held would not be filled. On March 14, 1973 plaintiff returned to work as a temporary employee for the Company and was paid $130.80 per week in that position. After the project on which the plaintiff was working as temporary employee was completed, her temporary employment ceased on April 13, 1973.

During the period from December 29, 1972 until May 10, 1973, plaintiff applied for three permanent positions with the company: Namely PBX Operator on March 8, 1973, Teller on March 14, 1973 and Deposit Refund Clerk on March 20, 1973. The positions of PBX Operator and Teller were sought by other persons who were then permanent Company employees and in accordance with Company policy the positions were given to such other employees. The duties of Deposit Refund Clerk were transferred to another employee in the Credit Department and accordingly that position was not filled.

On May 10, 1973, plaintiff requested me to change her employment status from pregnancy leave to terminated in

order that she might draw unemployment compensation. I advised plaintiff against being terminated on the ground that she would no longer be in a preferential position in the event a job became available for which no one in the Company was applying. Nevertheless, plaintiff insisted that she be terminated and she was terminated. Attached hereto as Exhibit 1 is a copy of a request for termination signed by plaintiff.

Subsequent to plaintiff's original employment by the Company in March 1969, she married another employee of the Company. It is Company policy not to hire members of the same immediate family. If two employees marry, the Company's policy provides that one of the two employees may be transferred or requested to resign. Although I did not consider it necessary to transfer plaintiff or her husband to another department or to request either one of them to resign, plaintiff's husband is still an employee of the Company and rehiring the plaintiff at this time would be in violation of Company policy.

As a condition of employment, every employee of Nashville Gas Company is required to be covered under a group life, health and accident policy issued by Provident Life and Accident Insurance Company. In addition to other health and hospitalization benefits, said policy also provides for payment of 50% of the customary and reasonable fees incurred in connection with pregnancy. Such pregnancy benefits apply to female employees and dependent wives of male employees. Although the insurance plan terminates with respect to an employee at the time such employee's active employment ceases, the maternity benefits continue to apply for up to nine months after termination if pregnancy exists on the date of termination and if such benefits would have been payable had delivery occurred on the date such active employment ceases. In

connection with plaintiff's pregnancy, $333.48 was paid under the group insurance plan.

The Company does not have any disability insurance plan for its employees but does provide a specified number of sick leave days based on the employee's seniority. Employees, like plaintiff, who go on pregnancy leave are not paid for any accumulated sick leave but are paid for any accumulated vacation time. At the time plaintiff was placed on pregnancy leave, she did not have any accumulated vacation time.

/s/ Elmer L. Henson, Jr.
Elmer L. Henson, Jr.

Sworn to and subscribed before me, this 9th day of July, 1974.

/s/ Jerry L. McCord
Notary Public

My Commission expires: 1-31-78.

Exhibit 1

May 10, 1973

Due to lack of work and job openings, I would like the Nashville Gas Company to release me from my leave of absence, and make my status termination due to reduction in force.

This will let me draw from my unemployment until I either find another job or a job opening occurs with the Company.

/s/ Nora D. Satty
Nora D. Satty

(Caption Omitted)

ORDER

(Filed July 10, 1974)

This cause came on to be heard on the tenth day of July, 1974 before the Honorable L. Clure Morton, United States District Judge, upon the motion by the Plaintiff for a preliminary injunction, the sworn complaint, the testimony of witnesses and the affidavit of Elmer L. Henson, Jr., from all of which the Court is of the opinion that the Plaintiff has failed to establish any irreparable injury that will be suffered from the failure to grant the preliminary injunction and that monetary damages can compensate Plaintiff for any injury she may suffer.

It is accordingly ORDERED that the motion for preliminary injunction be and hereby is denied.

(Caption Omitted)

ANSWER

(Filed July 22, 1974)

The defendant Nashville Gas Company for answer to the Complaint heretofore filed against it states as follows:

1. It admits the allegations of paragraph 1 of the Complaint.

2. It denies that it has committed or is committing any unlawful employment practices.

3. It admits the allegations of paragraph 3 of the Complaint.

4. It admits the allegations of paragraph 4 of the Complaint.

5. It denies that plaintiff is entitled to maintain this action as a class action.

6. It admits the allegations of paragraph 6 of the Complaint.

7. It admits the allegations of paragraph 7 of the Complaint.

8. It admits that on December 29, 1972, plaintiff was placed on pregnancy leave on the instructions of Elmer Henson, Jr., its Vice-President—Personnel. It is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning any advice given or not given by plaintiff's physician at that time but would state that on December 29, 1972, plaintiff had been absent from work for four consecutive days as a result of her pregnancy.

9. It admits that during her absence due to her pregnancy plaintiff was not paid sick-pay benefits to which she would have been entitled if she had been absent due to illness but would state that pregnancy is not an illness. It would state that whether or not plaintiff's expenses of pregnancy were as fully covered by its group insurance policy, as were illnesses and disabilities requiring medical attention, would depend on the circumstances of such illnesses and disabilities and it would further state that the expenses of plaintiff's pregnancy were as fully covered under its group insurance policy as would be the expenses of pregnancy of the wife of a male employee.

10. It admits that the plaintiff returned to work for defendant on March 14, 1973 and that at the time she returned she was considered a temporary employee. It denies that plaintiff was paid the rate of pay for beginning employees and denies that plaintiff was earning $17.00 per week more prior to December 29, 1972.

11. It denies that it refused to consider plaintiff's application for job openings for which she was qualified but would state that she was not placed in the job openings for which she applied because there were other applicants for such job openings who, at the time such job openings were filled, had longer continuous active employment with the defendant.

12. It denies the allegations of paragraph 12 of the Complaint.

13. It denies the allegations of paragraph 13 of the Complaint.

14. It denies the allegations of paragraph 14 (numbered as paragraph 9 on page 5) of the Complaint.

15. It denies the allegations of paragraph 15 (numbered as paragraph 10 on page 5) of the Complaint.

16. It denies the allegations of paragraph 16 (numbered as paragraph 11 on page 5) of the Complaint.

17. Plaintiff's action is barred by the statute of limitations set forth in Section 28-304 of Tennessee Code Annotated.

(Caption Omitted)

ANSWERS TO PLAINTIFF'S INTERROGATORIES

(Filed August 23, 1974)

INTERROGATORY NO. 1. State your name.

RESPONSE TO INTERROGATORY NO. 1: Elmer Lee Henson, Jr.

INTERROGATORY NO. 2: State your position with Nashville Gas Company.

RESPONSE TO INTERROGATORY NO. 2: Vice President—Personnel.

INTERROGATORY NO. 3: In that position are you familiar with the policies of the Nashville Gas Company concerning employees who are out of work for extended periods of time due to injuries or illness which are not job related?

RESPONSE TO INTERROGATORY NO. 3: Yes.

INTERROGATORY NO. 4: What is this policy?

RESPONSE TO INTERROGATORY NO. 4: Employees other than supervisors who are absent from work for extended periods of time due to non job-related injuries or illnesses are paid sick leave pursuant to the description of sick leave contained in the Company's Employee Policy Manual. At such time as the employee is able to resume work, he or she is generally returned to the job previously held (see response to Interrogatory No. 5) if his or her physical condition permits. In certain cases, an employee may be placed on formal leave of absence, in which case when the employee is able to resume work, he or she returns to whatever position is available.

INTERROGATORY NO. 5: Does Nashville Gas Company hold jobs open for persons who are out for extended periods of time with non job-related illnesses or injuries?

RESPONSE TO INTERROGATORY NO. 5: Although the Company does not feel that it is obligated to hold jobs open for an employee who is absent for extended periods of time with non job-related illnesses or injury, it has in practice usually held such job open.

INTERROGATORY NO. 6: After a non job-related illness or injury, is an employee who returns to work at

Nashville Gas Company paid the same rate of pay as he was paid prior to said illness or injury?

RESPONSE TO INTERROGATORY NO. 6: If, as is normally the case, the employee returns to the job previously held, he or she returns at the same classification rate and thus would be entitled to any pay raises that may have taken effect during the employee's absence.

INTERROGATORY NO. 7: After a non job-related illness or injury, is an employee who returns to work at Nashville Gas Company entitled to the seniority which he or she had accrued prior to the illness or injury?

RESPONSE TO INTERROGATORY NO. 7: Yes, unless the employee was on formal leave of absence, in which case he retains seniority for purposes of vacation, pension, etc., but not for the purpose of bidding on job openings.

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INTERROGATORY NO. 23: Is Lawrence Deal an employee of Nashville Gas Company?

RESPONSE TO INTERROGATORY NO. 23: Yes.

INTERROGATORY NO. 24: If the answer to question 23 is yes, has he ever been absent from Nashville Gas Company due to back trouble?

RESPONSE TO INTERROGATORY NO. 24: Yes—four operations.

INTERROGATORY NO. 25: If the answer to question 24 is yes, how long was Mr. Deal absent?

RESPONSE TO INTERROGATORY NO. 25: Approximately 2/26, out 1 1/2 months; 12/68, out 1 1/2 months; cannot remember dates on other two operations.

INTERROGATORY NO. 26: If the answer to question 24 is yes, was his injury or illness job-related?

RESPONSE TO INTERROGATORY NO. 26: No.

INTERROGATORY NO. 27: If the answer to question 24 is yes, what was Mr. Deal's rate of pay and how much seniority and what were his duties, had Mr. Deal acquired prior to his leaving Nashville Gas Company for treatment of this condition?

RESPONSE TO INTERROGATORY NO. 27: 1962—$96.90, approximately 15 years; Senior Clerk—Distribution; 1968 $124.80, approximately 21 years; Senior Clerk—Distribution. Previous to this, probably 1957, Mr. Deal had a back operation and was unable to return to his classification as Serviceman at $2.34/hr. (405.60 per month) He returned to work 12/29/58 and was placed in a Mobile Collection office, in service at that time, at a rate of $415 per month. This office was discontinued in September 1960 and he was given the classification of Senior Clerk in the Distribution Department as his back would not permit him to return to the work required by Servicemen classification. He is still working in classification of Senior Clerk in the Distribution Department at this time. His rate of pay upon taking Senior Clerk position was $2.35 per hour or $407.55 per month.

INTERROGATORY NO. 28: If the answer to question 24 is yes, did Mr. Deal return to work after the treatment for this condition?

RESPONSE TO INTERROGATORY NO. 28: Yes.

INTERROGATORY NO. 29: If the answer to question 28 is yes, when did Mr. Deal return to work for Nashville Gas Company after treatment for this condition?

RESPONSE TO INTERROGATORY NO. 29: 2/62, approximately 1 1/2 months; 12/68, approximately after

1 1/2 months. Do not know dates of previous other operations except that one was in 1957.

INTERROGATORY NO. 30: If the answer to question 28 is yes, what was Mr. Deal's rate of pay upon returning to work for Nashville Gas Company?

RESPONSE TO INTERROGATORY NO. 30: 1962, $99.80 (due to general increases while he was out); 1968, $124.80.

INTERROGATORY NO. 31: If the answer to question 28 is yes, what were the duties of Mr. Deal with Nashville Gas Company upon his return?

RESPONSE TO INTERROGATORY NO. 31: Senior Clerk—Distribution Department, 1958—Supervisor Mobile Collection office followed by Senior Clerk in Distribution Department.

INTERROGATORY NO. 32: If the answer to question 28 is yes, what amount of seniority was Mr. Deal credited with upon his return to Nashville Gas Company?

RESPONSE TO INTERROGATORY NO. 32: Seniority had been continued from date of hire.

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INTERROGATORY NO. 34: If the answer to question 33 is yes, what was the nature of the illness or injury?

RESPONSE TO INTERROGATORY NO. 34: Back Trouble.

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INTERROGATORY NO. 36: Is Paul Waggoner an employee of Nashville Gas Company?

RESPONSE TO INTERROGATORY NO. 36: Yes.

INTERROGATORY NO. 37: If the answer to question 36 is yes, has he ever been absent from Nashville Gas Company due to a heart attack?

RESPONSE TO INTERROGATORY NO. 37: Yes.

INTERROGATORY NO. 38: If the answer to question 37 is yes, how long was Mr. Waggoner absent?

RESPONSE TO INTERROGATORY NO. 38: From 1/26/70 to 5/11/70.

INTERROGATORY NO. 39: If the answer to question 37 is yes, was his injury or illness job-related?

RESPONSE TO INTERROGATORY NO. 39: No.

INTERROGATORY NO. 40: If the answer to question 37 is yes, what was Mr. Waggoner's rate of pay and how much seniority and what were his duties, had Mr. Waggoner acquired prior to his leaving Nashville Gas Company for treatment of this condition?

RESPONSE TO INTERROGATORY 40: $3.51 per hour; from 6/9/47 to 1/26/70; Serviceman.

INTERROGATORY NO. 41: If the answer to question 37 is yes, did Mr. Waggoner return to work after treatment for this condition?

RESPONSE TO INTERROGATORY NO. 41: Yes

INTERROGATORY NO 42: If the answer to question 41 is yes, when did Mr. Waggoner return to work for Nashville Gas Company after treatment for this condition?

RESPONSE TO INTERROGATORY NO. 42: 5/11/70.

INTERROGATORY NO. 43: If the answer to question 41 is yes, what was Mr. Waggoner's rate of pay upon returning to work for Nashville Gas Company?

RESPONSE TO INTERROGATORY NO. 43: $3.51 per hour.

INTERROGATORY NO. 44: If the answer to question 41 is yes, what were the duties of Mr. Waggoner with Nashville Gas Company upon his return?

RESPONSE TO INTERROGATORY NO. 44: Serviceman.

INTERROGATORY NO. 45: If the answer to question 41 is yes, what amount of seniority was Mr. Waggoner credited with upon his return to Nashville Gas Company.

RESPONSE TO INTERROGATORY NO. 45: Seniority continued from date of hire.

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INTERROGATORY NO. 75: Is Eldon Horner an employee of Nashville Gas Company?

RESPONSE TO INTERROGATORY NO. 75: Yes.

INTERROGATORY NO. 76: If the answer to question 75 is yes, has he ever been absent from Nashville Gas Company due to back trouble?

RESPONSE TO INTERROGATORY NO. 76: Yes.

INTERROGATORY NO. 77: If the answer to question 76 is yes, how long was Mr. Horner absent?

RESPONSE TO INTERROGATORY NO. 77: 2/17/70 to 5/4/70

INTERROGATORY NO. 78: If the answer to question 76 is yes, was his injury or illness job-related?

RESPONSE TO INTERROGATORY NO. 78: No.

INTERROGATORY NO. 79: If the answer to question 76 is yes, what was Mr. Horner's rate of pay and how

much seniority and what were his duties, had Mr. Horner acquired prior to his leaving Nashville Gas Company for treatment of this condition?

RESPONSE TO INTERROGATORY NO. 79: $3.51 per hour; 6/11/62 to 2/17/70; Serviceman.

INTERROGATORY NO. 80: If the aswer to question 76 is yes, did Mr. Horner return to work after treatment for this condition?

RESPONSE TO INTERROGATORY NO. 80: Yes.

INTERROGATORY NO. 81: If the answer to question 80 is yes, when did Mr. Horner return to work for Nashville Gas Company after treatment for this condition?

RESPONSE TO INTERROGATORY NO. 81: 5/4/70

INTERROGATORY NO. 82: If the answer to question 80 is yes, what was Mr. Horner's rate of pay upon returning to work for Nashville Gas Company?

RESPONSE TO INTERROGATORY NO. 82: $3.51 per hour.

INTERROGATORY NO. 83: If the answer to question 80 is yes, what were the duties of Mr. Horner with Nashville Gas Company upon his return?

RESPONSE TO INTERROGATORY NO. 83: Serviceman.

INTERROGATORY NO. 84: If the answer to question 80 is yes, what amount of seniority was Mr. Horner credited with upon his return to Nashville Gas Company?

RESPONSE TO INTERROGATORY NO. 84: Seniority continued from date of hire.

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INTERROGATORY NO. 88: Is Jane Dixon an employee of Nashville Gas Company?

RESPONSE TO INTERROGATORY NO. 88: Yes.

INTERROGATORY NO. 89: If the answer to question 88 is yes, has she ever been absent from Nashville Gas Company due to a heart attack?

RESPONSE TO INTERROGATORY NO. 89: Yes.

INTERROGATORY NO. 90: If the answer to question 89 is yes, how long was Ms. Dixon absent?

RESPONSE TO INTERROGATORY NO. 90: Two occasions; 3/71 to 1/72; 10/72 to 3/73.

INTERROGATORY NO. 91: If the answer to question 89 is yes, was her injury or illness job-related?

RESPONSE TO INTERROGATORY NO. 91: No.

INTERROGATORY NO. 92: If the answer to question 89 is yes, what was Ms. Dixon's rate of pay and how much seniority and what were her duties, had Ms. Dixon acquired prior to her leaving Nashville Gas Company for treatment of this condition?

RESPONSE TO INTERROGATORY NO. 92: $140.80 per week; 11/24/52 to 3/71; Senior Clerk in General Accounting.

INTERROGATORY NO. 93: If the answer to question 89 is yes, did Ms. Dixon return to work after treatment for this condition?

RESPONSE TO INTERROGATORY NO. 93: Yes.

INTERROGATORY NO. 94: If the answer to question 93 is yes, when did Ms. Dixon return to work for Nashville Gas Company after treatment for this condition?

RESPONSE TO INTERROGATORY NO. 94: 1/72 and 3/73.

INTERROGATORY NO. 95: If the answer to question 93 is yes, what was Ms. Dixon's rate of pay upon returning to work for Nashville Gas Company?

RESPONSE TO INTERROGATORY NO. 95: $154.80 (due to general increase while she was out); $167.20 (due to general increase while she was out).

INTERROGATORY NO. 96: If the answer to question 93 is yes, what were the duties of Ms. Dixon with Nashville Gas Company upon her return?

RESPONSE TO INTERROGATORY NO. 96: Senior Clerk—General Accounting.

INTERROGATORY NO. 97: If the answer to question 93 is yes, what amount of seniority was Ms. Dixon credited with upon her return to Nashville Gas Company?

RESPONSE TO INTERROGATORY NO. 97: Seniority continued from date of hire.

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INTERROGATORY NO. 100: If the answer to question 89 is no, has Ms. Dixon ever missed two months or more from work with Nashville Gas Company for any non job-related illness or injury?

RESPONSE TO INTERROGATORY NO. 100: N.A.

INTERROGATORY NO. 101: Is Laney Frizzell an employee of Nashville Gas Company?

RESPONSE TO INTERROGATORY NO. 101: Yes.

INTERROGATORY NO. 102: If the answer to question 101 is yes, has he ever been absent from Nashville Gas Company due to an auto accident?

RESPONSE TO INTERROGATORY NO. 102: Yes.

INTERROGATORY NO. 103: If the answer to question 102 is yes, how long was Mr. Frizzell absent?

RESPONSE TO INTERROGATORY NO. 103: 1/19/71 to 2/8/71.

INTERROGATORY NO. 104: If the answer to question 102 is yes, was his injury or illness job-related?

RESPONSE TO INTERROGATORY NO. 104: No.

INTERROGATORY NO. 105: If the answer to question 102 is yes, what was Mr. Frizzell's rate of pay and how much seniority and what were his duties, had Mr. Frizzell acquired prior to his leaving Nashville Gas Company for treatment of this condition?

RESPONSE TO INTERROGATORY NO. 105: $148.80; from 3/17/41 to 1/19/71; Senior Clerk—Credit.

INTERROGATORY NO. 106: If the answer to question 102 is yes, did Mr. Frizzell return to work after treatment for this condition?

RESPONSE TO INTERROGATORY NO. 106: Yes.

INTERROGATORY NO. 107: If the answer to question 106 is yes, when did Mr. Frizzell return to work for Nashville Gas Company after treatment for this condition?

RESPONSE TO INTERROGATORY NO. 107: 2/8/71.

INTERROGATORY NO. 108: If the answer to question 107 is yes, what was Mr. Frizzell's rate of pay upon returning to work for Nashville Gas Company?

RESPONSE TO INTERROGATORY NO. 108: $148.80.

INTERROGATORY NO. 109: If the answer to question 107 is yes, what were the duties of Mr. Frizzell with Nashville Gas Company upon his return?

RESPONSE TO INTERROGATORY NO. 109: Senior Clerk—Credit.

INTERROGATORY NO. 110: If the answer to question 107 is yes, what amount of seniority was Mr. Frizzell credited with upon his return to Nashville Gas Company?

RESPONSE TO INTERROGATORY NO. 110: Seniority continued from date of hire.

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INTERROGATORY NO. 114: Is Lucian Mitchell an employee of Nashville Gas Company?

RESPONSE TO INTERROGATORY NO. 114: Yes.

INTERROGATORY NO. 115: If the answer to question 114 is yes, has he ever been absent from Nashville Gas Company due to back trouble?

RESPONSE TO INTERROGATORY NO. 115: Yes.

INTERROGATORY NO. 116: If the answer to question 115 is yes, how long was Mr. Mitchell absent?

RESPONSE TO INTERROGATORY NO. 116: Two occasions, 9/71, out approximately 6 months; 4/74 to 6/74.

INTERROGATORY NO. 117: If the answer to question 115 is yes, was his injury or illness job-related?

RESPONSE TO INTERROGATORY NO. 117: No.

INTERROGATORY NO. 118: If the answer to question 115 is yes, what was Mr. Mitchell's rate of pay and how much seniority and what were his duties had Mr. Mitchell acquired prior to his leaving Nashville Gas Company for treatment of this condition?

RESPONSE TO INTERROGATORY NO. 118: With respect to both periods of absence, Mr. Mitchell's seniority dated from 11/22/48 and he was serving as Automotive Supervisor. Defendant objects to revealing Mr. Mitchell's rate of pay on the ground that the salaries of supervisory personnel are regarded as confidential information and on the further ground that in view of the answer to Interrogatory No. 121, Mr. Mitchell's rate of pay is not relevant.

INTERROGATORY NO. 119: If the answer to question 115 is yes, did Mr. Mitchell return to work after treatment for this condition?

RESPONSE TO INTERROGATORY NO. 119: Yes.

INTERROGATORY NO. 120: If the answer to question 119 is yes, when did Mr. Mitchell return to work for Nashville Gas Company after treatment for this condition?

RESPONSE TO INTERROGATORY NO. 120: Approximately 3/72; 6/74.

INTERROGATORY NO. 121: If the answer to question 120 is yes, what was Mr. Mitchell's rate of pay upon returning to work for Nashville Gas Company?

RESPONSE TO INTERROGATORY NO. 121: With respect to each period of absence, Mr. Mitchell's rate of pay upon returning to work was the same as when such period of absence commenced. For the reasons stated in Response to Interrogatory No. 118, Defendant objects to revealing Mr. Mitchell's rate of pay.

INTERROGATORY NO. 122: If the answer to question 120 is yes, what were the duties of Mr. Mitchell with Nashville Gas Company upon his return?

RESPONSE TO INTERROGATORY NO. 122: Automotive Supervisor.

INTERROGATORY NO. 123: If the answer to question 120 is yes, what amount of seniority was Mr. Mitchell credited with upon his return to Nashville Gas Company?

RESPONSE TO INTERROGATORY NO. 123: Seniority continued from date of hire.

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(Caption Omitted)

STIPULATION OF FACTS

(Filed August 27, 1974)

1. The Plaintiff was hired by Nashville Gas Company (the "Company") as a junior clerk in the customer accounting department on March 24, 1969, and was promoted to clerk on December 22, 1969. She continued to hold that position until December 29, 1972 when she was placed on pregnancy leave.

2. At some point during the year 1972 after Elmer L. Henson, Jr. became aware that Plaintiff was pregnant, he discussed with her and two other female employees who were pregnant at the time the policy of the Company with respect to pregnancy leaves. At that time, he told the Plaintiff and the other two female employees that a decision as to when they should commence pregnancy leave would be based on their doctor's opinion, their duties with the Company, their work area, and degree of public contact, but that he was to have the final decision as to when pregnancy leave was to commence. He explained to the Plaintiff and the other two female employees that he understood the importance to them of the income they were earning from the Company, but at the same time

had to consider their welfare, the welfare of the unborn child and the welfare of the Company in determining when pregnancy leave should commence. Friday, December 22 and Monday, December 25 were Company holidays. After Plaintiff failed to report for work on Tuesday, December 26, Wednesday, December 27, Thursday, December 28, and Friday, December 29, 1972, Elmer Henson directed her supervisor to request her to request pregnancy leave and pregnancy leave was granted commencing December 29, 1972. Plaintiff's child was born on January 23, 1973. The other two female employees were placed on leave one month and two days, and one month and ten days before delivery of their respective children.

3. It has been and is now the policy of the Company to grant pregnancy leaves for up to one year. It is the policy of the Company to permit employees on pregnancy leave to return to permanent employment when there is an available position for which such employee is qualified and for which no person then permanently employed is bidding. Prior to such permanent employment becoming available, it is the policy of the Company to give the employee on pregnancy leave temporary work for which she is qualified when such temporary work is available. An employee who has been on pregnancy leave and returns to permanent employment retains the seniority she had previously accumulated for purposes of pension, vacation, etc., but does not retain such seniority for the purpose of bidding on job openings.

4. Since 1962, only two male employees have requested leaves of absence. The first male employee was granted a year's leave of absence to complete work for a college degree, but he did not seek to return to work at the end of his leave of absence. Another male employee is currently on leave to complete his education. If such

employee seeks to return to work, he will be afforded the same treatment afforded female employees on pregnancy leave. Similarly, if any other employee, male or female, were granted a leave of absence, such employee would be afforded the same treatment as that given to female employees on pregnancy leave.

5. At the time that the Plaintiff was placed on pregnancy leave on December 29, 1972, she was earning $140.80 per week. Due to the fact that the Company was then contemplating converting certain of its accounting functions to a computer it was determined by her supervisor at the time she was placed on pregnancy leave that the position she held would not be filled. On March 14, 1973, Plaintiff returned to work as a temporary employee for the Company and was paid $130.80 per week in that position. After the project on which the Plaintiff was working as a temporary employee was completed, her temporary employment ceased on April 13, 1973.

6. On May 10, 1973, Plaintiff requested Mr. Henson to change her employment status from pregnancy leave to terminated in order that she might draw unemployment compensation. Exhibit 1 to the affidavit of Elmer L. Henson, Jr., dated July 9, 1974, is a copy of a request for termination signed by Plaintiff.

7. As a condition of employment, every employee of Nashville Gas Company is required to be covered under a group life, health and accident policy issued by Provident Life and Accident Insurance Company. The cost of such policy is borne half by the Company and half by the employees. In addition to other health and hospitalization benefits, said policy also provides for payment of 50% of the customary and reasonable fees incurred in connection with pregnancy. Such pregnancy benefits apply to female employees and dependent wives of male employees.

Although the insurance plan terminates with respect to an employee at the time such employee's active employment ceases, the maternity benefits continue to apply for up to nine months after termination if pregnancy exists on the date of termination and if such benefits would have been payable had delivery occurred on the date such active employment ceases. In connection with Plaintiff's pregnancy, $333.48 was paid under the group insurance plan.

8. The Company does not have any disability insurance plan for its employees, but does provide a specified number of sick leave days based on the employee's seniority. Employees, like Plaintiff, who go on pregnancy leave are not paid for any accumulated sick leave, but are paid for any accumulated vacation time. At the time Plaintiff was placed on pregnancy leave, she did not have any accumulated vacation time.

9. Subsequent to May 10, 1973, the Company did hire as a temporary employee the wife of a permanent employee.

10. Normal pregnancy is a temporarily disabling condition resulting from a normal bodily function.

11. The action of the Company in not permitting the Plaintiff to return to work until March 14, 1973 was not unreasonable or arbitrary.

12. Plaintiff's principal duties as clerk during 1972 involved the posting of merchandise accounts. Although the Company subsequently decided to discontinue its merchandise business, it anticipates that it will be several years before all of its merchandise accounts are paid in full and, subsequent to the commencement of Plaintiff's pregnancy leave, the posting of merchandise accounts had been done by temporary employees and other permanent employees.

13. Between May 10, 1973 and August 10, 1974, Plaintiff has received wages and unemployment compensation totaling $3,342.19.

14. The number of persons who have been placed on pregnancy leave by the Company since July 2, 1965 is twelve and the parties agree that such number is not so numerous that this action should be maintained as a class action.

15. Each of the three positions for which Plaintiff applied between December 29, 1972 and May 10, 1973 were filled by other females who were already permanent employees of the Company. Had Plaintiff been permitted to retain her seniority accumulated prior to the commencement of pregnancy leave for the purposes of bidding on such positions, she would have had more seniority than each of the other three persons.

16. Between December 29, 1972 and July 1, 1974, the following employees of the Company are the only employees who have been on pregnancy leave:

(a) *Nora D. Satty*—leave commenced 12/29/72—returned as temporary employee from 3/14/73 to 4/13/73—termination on 5/10/73.

(b) *Marsha Cushman*—leave commenced 2/19/73—terminated due to reduction in force on 8/27/73.

(c) *Shirley Freels*—leave commenced 3/16/73—terminated due to reduction in force 8/21/73.

(d) *Betty Branch*—leave commenced 8/31/73—returned to work as permanent employee on 10/29/73.

(e) *Kathie Canter*—leave commenced 12/27/73—returned as temporary employee on 3/18/74 and became permanent employee on 4/29/74.

17. In addition to the above listed employees who took pregnancy leave, three other permanent clerical employees of the Company have resigned since December 1972. However, since December 1972 only one new permanent clerical employee or PBX operator has been hired by the Company and that employee was hired on May 6, 1974.

(Caption Omitted)

PRE-TRIAL ORDER

(Filed August 28, 1974)

All pleadings are amended to comply with this Pre-Trial Order.

The names of all witnesses (except impeachment witnesses) shall be exchanged by counsel five (5) days before trial.

All exhibits and documents (except impeachment exhibits and documents) shall be exhibited to adversary counsel two (2) days before trial and shall be stamped by the Clerk of the Court before 9:00 A.M. on the date of trial.

The testimony of witnesses, affidavit and exhibits introduced at the hearing on Plaintiff's Motion for Preliminary Injunction on July 10, 1974, shall be deemed to be in evidence at the trial without any further action by either party.

ISSUES

The principal issue in this case is whether the application to Plaintiff of the Company's employment policies with respect to pregnancy was unlawful discrimination in violation of Title VII of the Civil Rights Act of 1964. Under this general issue are the following specific issues:

1. Was the payment of pregnancy benefits to Plaintiff under the Company's group health and hospitalization insurance plan unlawful discrimination in violation of Title VII?

2. Was the denial of sick leave benefits to Plaintiff when she was placed on pregnancy leave unlawful discrimination in violation of Title VII?

3. Was the Company's action in not holding Plaintiff's job open for her while she was on pregnancy leave discrimination in violation of Title VII?

4. Was the policy of the Company in rehiring Plaintiff on a temporary basis with the beginning rate of pay and no credit for accumulated seniority for purposes of bidding on job openings unlawful discrimination in violation of Title VII?

5. Was the action of the Company in requiring Plaintiff to commence pregnancy leave on December 29, 1972 arbitrary and thus unlawful discrimination in violation of Title VII?

A separate issue is whether the termination of Plaintiff's temporary employment on April 13, 1973 was in retaliation for her complaining about the Company's employment policies with respect to pregnancy?

To what relief, if any, is Plaintiff entitled if Defendant is found to have violated Title VII?

PLAINTIFF'S THEORY

Although pregnancy is not a sickness or an illness, it is a temporary disability which is totally necessary for the continuation of the human race. To oversimplify simple biology, it is also a condition which invariably occurs only in the female. Because it is necessary and because it oc-

curs only in the female sex, to treat it differently from illnesses or non-job related disabilities is discrimination based on sex.

Employees temporarily disabled by pregnancy are treated differently by Nashville Gas Company than are employees with other types of temporary disabilities. All pregnant employees are women, therefore, Nashville Gas Company's policy in regard to pregnant employees amounts to sex discrimination. The fact that it does not discriminate against all women employees is irrelevant. When a woman employee becomes pregnant, her disability is treated differently and only women are subjected to this different treatment. Because of the exclusiveness of this treatment, discrimination due to pregnancy is therefore discrimination due to sex.

The Defendant's requiring Plaintiff to begin her pregnancy leave on December 29th was an unreasonable, arbitrary and discriminatory act by Defendant in light of the fact that Plaintiff's child was not due until mid-February, her doctor had not advised her to cease her employment and her absence from work for four days was caused by a combination of a cold and medicines that she had been taking.

Defendant's insurance plan which pays less for pregnancy than it does for other illnesses or disabilities, likewise is a form of discrimination due to sex. The fact that the plan treats wives of male employees the same as female employees is irrelevant. The insurance plan pays less for a condition only a woman employee is subject to than it pays for other illnesses, injuries or disabilities.

The Defendant's refusal to provide sick leave benefits to Plaintiff during her pregnancy is discrimination based on sex. Pregnancy leave cannot be equated with a leave

of absence as Defendant maintains. Leave of absence is voluntary while pregnancy is not always voluntary and the facts of this case show that the pregnancy of Plaintiff was not in fact voluntary. Further, the Defendant provides sick leave benefits to persons who have non-job related disabilities which they have voluntarily incurred.

Failure of Defendant to reinstate Plaintiff in her prior position with its attendant rights and privileges, constitutes sex discrimination, since employees who suffer other types of temporary disabilities are reinstated with all seniority rights and at their previous rate of pay by the Defendant. The failure of Defendant to provide Plaintiff with her seniority rights as far as bidding on job openings on her return to temporary employment constitutes sex discrimination. Employees of Defendant who return to work from other types of temporary disabilities do not lose these seniority rights. The mere fact that the jobs for which Plaintiff bid were filled by other women does not remove the taint of discrimination.

The Defendant's termination of Plaintiff on April 13th, 1973 was in retaliation for Plaintiff's complaints concerning Defendant's policy in regard to pregnant employees and thus was an additional discriminatory act. Plaintiff's letter of May 10, 1974 was intended solely for the purpose of allowing Plaintiff to draw unemployment compensation. It was not Plaintiff's understanding or belief that by writing the letter she was excluding herself from further consideration for future job openings with Defendant.

DEFENDANT'S THEORY

Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Pregnancy is not a sickness or an illness and is not required to be

treated as such. Absent a showing that distinctions involving pregnancy are mere pretext designed to effect an invidious discrimination against the members of one sex or the other, an employer is free to treat pregnancy differently from the way in which it treats other physical conditions. The Defendant's pregnancy policy divides its employees into two groups: Pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes and the benefits of the program thus include members of both sexes. This is Defendant's primary defense to the fact that it treats pregnancy differently from non job-related illnesses or accidents. In addition to this primary defense, the Defendant's theories with respect to the various specific sub-issues are as follows:

Insofar as the question of benefits under the Defendant's group health and hospital insurance plan is concerned, it is the position of the Defendant that since the pregnancy benefits are the same for female employees as for wives of male employees, the impact on the families of male and female employees is the same and thus there is no discrimination.

With respect to the payment of sick leave benefits, it is Defendant's position that it does not pay sick leave benefits to any other employees who take a leave of absence and that since pregnancy is not a sickness but rather results from a normal bodily function, the failure to pay sick leave benefits to employees on pregnancy leave is not unlawful discrimination.

With respect to plaintiff's seniority status when she resumed work as a temporary employee, it is defendant's position that denying her her previously accumulated seniority for the purpose of bidding on permanent job open-

ings was not unlawful sex discrimination because the jobs on which plaintiff bid were filled by other female employees.

With respect to defendant's failure to hold open plaintiff's job when she went on pregnancy leave, it is defendant's position that while it has permitted other employees to return to their jobs after extended absences, it has done so only when the nature of the job was such that the Company could function effectively without replacing the absent employee. Insofar as plaintiff's job was concerned, the Company had by the time her pregnancy leave began determined to automate various functions performed in her department and thus to reduce the size of the department through attribution and by dismissal if necessary. Thus the Company decided for valid reasons not to hold open plaintiff's job for her.

With respect to the reasonableness of requiring plaintiff to begin pregnancy leave on December 29, 1972, defendant feels that its action was reasonable in light of the fact that such date was only 25 days prior to delivery and plaintiff had been absent from work for four consecutive days as a result of the pregnancy.

With respect to the question of reinstatement and/or back pay, it is the position of the defendant that even if it is found to have discriminated against the plaintiff it can have no liability for the reinstatement or back pay subsequent to May 10, 1973 since plaintiff voluntarily terminated her employment at that time in order to draw unemployment compensation. Furthermore, the Company was and is in the process of reducing its number of personnel in the departments for which plaintiff would be qualified and in which she had made job applications and, accordingly, its failure to rehire was based on legitimate business reasons.

It is the defendant's position that under the facts in this case there is no basis for the allegations that plaintiff's discharge was in retaliation for her assertion of any rights under Title VII of the Civil Rights Act.

(Caption Omitted)

MEMORANDUM

(Filed November 4, 1974)

This cause of action was brought pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e, et seq.) alleging sex discrimination in defendant's employment policies with respect to pregnancy. Plaintiff seeks back wages, lost benefits, attorney's fees and injunctive relief. Plaintiff further alleges that her employment was terminated because she complained about the allegedly discriminatory policies.

There is no dispute as to the jurisdiction of this court under Title VII of the Civil Rights Act of 1964.

Originally the cause was brought as a class action. However, the parties stipulated that the number of persons whom plaintiff may properly represent is not sufficiently numerous to permit maintenance of a class action under Rule 23, Federal Rules of Civil Procedure.

Simultaneously with filing of this action, plaintiff filed a motion for entry of a preliminary injunction requiring defendant to reinstate her as an employee and enjoining defendant from retaliatory measures. A hearing was held upon plaintiff's motion on July 10, 1974. At the close of the hearing, the court determined that a preliminary injunction would not be issued because plaintiff failed to establish that irreparable harm would be suffered by denial of the motion and it appeared that monetary dam-

ages could compensate plaintiff for any injury she might suffer.

The threshold question is whether or not defendant's employment policies, with respect to pregnancy, constitute unlawful sex discrimination.

I.

The parties have stipulated as to the following statement describing defendant's policy of health insurance:

> As a condition of employment, every employee of Nashville Gas Company is required to be covered under a group life, health and accident policy issued by Provident Life and Accident Insurance Company. The cost of such policy is borne half by the Company and half by the employees. In addition to other health and hospitalization benefits, said policy also provides for payment of 50% of the customary and reasonable fees incurred in connection with pregnancy. Such pregnancy benefits apply to female employees and dependent wives of male employees. Although the insurance plan terminates with respect to an employee at the time such employee's active employment ceases, the maternity benefits continue to apply for up to nine months after termination and if such benefits would have been payable had delivery occurred on the date such active employment ceases.

Plaintiff's theory is that defendant's group insurance program discriminates on the basis of sex because a reduced benefit is paid in the case of pregnancy when compared with hospitalizations for other causes. There is no doubt that the insurance program makes a distinction in the case of pregnancy as to the extent of benefits available. However, the pregnancy distinction applies to both male

and female employee-beneficiaries of the plan. The insurance proceeds are paid on behalf of the employee, male or female, according to a single formula in all pregnancy cases. Thus, for a male employee whose wife is pregnant, the insurance benefit is the same as provided to a pregnant female employee such as plaintiff.

The parties further stipulated that pregnancy is a temporary disabling condition resulting from a normal bodily function. In this case the plaintiff had a normal pregnancy and childbirth. Also, the parties have agreed that defendant does not have a disability insurance plan for its employees. This is not a situation where a female employee receives a lesser benefit for her disability than those received by males. Defendant's insurance plan pays no benefit whatsoever for disabilities. The only benefit under defendant's insurance plan is for payment of medical expenses. The issue in this case is whether defendant's insurance program discriminates unlawfully between male and female employees in the payment of medical expenses.

No evidence has been introduced to show a failure on defendant's part to comply with the Equal Employment Opportunity Commission guidelines on fringe benefits. Title 29, Code of Federal Regulations, Section 1604.9(d) provides:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not available for female employees; or to make available benefits to the husbands of female employees which are not available for male employees. An example

> of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

So far as the issue relating to the insurance program is concerned, the court finds no distinction in the application, operation, or effect of the insurance plan to support a finding of unlawful discrimination by reason of sex since all employees, male or female, receive the same benefit.

II.

It has been and is now the policy of defendant to require pregnant employees to take maternity leave. Although defendant's "Employee Policy Manual," of September 27, 1971, presents availability of maternity leave in permissive terms, to wit:

> In case of pregnancy, an employee, upon written request *may* be granted a leave of absence. . . (Emphasis added)

actual practice demonstrates that a pregnant employee may not decline to accept maternity leave, and still retain employee affiliation with the defendant company. Once an employee is placed in maternity leave status, she may remain in that status for up to one year. There is no statement of policy concerning the status of an employee on maternity leave who is unable to return to work after one year. A fair inference is that such an employee would be terminated.

Once an employee is classified as being in a leave status, i.e., leave of absence or pregnancy leave, it is defendant's policy to offer such an employee temporary work, when available, until a permanent position is open. After an employee returns from leave status and acquires perma-

nent employment, the defendant credits such person with seniority previously accumulated for the purposes of pension, vacation, and other employee benefits based on seniority. However, defendant does not credit an employee returning from leave status who is subsequently classified as a temporary or permanent employee with previously accumulated seniority for the purpose of bidding on job openings. The significance of this policy is illustrated in the present case where plaintiff returned from pregnancy leave as a temporary employee after more than four (4) years of continuous employment, next preceding maternity leave, and defendant failed to place her in one of several permanent job openings. All of these openings were filled by other employees credited with greater job-bidding seniority even though plaintiff had the earlier date of initial employment. It appears that seniority is the primary factor in the job bidding process and failure to credit plaintiff with seniority for this purpose is the sole reason she failed to gain a permanent position with defendant following her return from maternity leave.

Defendant asserts that the job bidding policies are the same for all employees, male or female, returning from a leave status.

The gravamen to defendant's contention is that only pregnant women are required to take leave. In all cases other than maternity the decision to take leave is entirely a voluntary matter with each employee.

It further appears that defendant maintains a policy of allowing leave in connection with non-work related illness or injury without loss of seniority or other indicia of good standing on the part of an employee where the non-work related disability does not concern pregnancy. It is only in the case of pregnancy that an employee is denied the opportunity to take "sick leave."

Defendant does not have a disability insurance plan for its employees, but does provide a specific number of sick leave days based on the employee's seniority. Employees, like plaintiff, who are placed on pregnancy leave are not paid for accumulated sick leave, but are paid for accumulated vacation time. Defendant's policy has been to allow employees who have been absent due to illness or non-work related disabilities to take "sick leave." Only in the case of pregnancy is an employee denied the right to take sick leave. It further appears that employees returning from long period of absence due to non-job related injuries do not lose their seniority and in fact their seniority continues to accumulate while absent.

Defendant asserts that the classification of employees as pregnant employees and non-pregnant employees for application of the aforementioned policies does not constitute unlawful sex discrimination under Title VII. Defendant acknowledges that a number of court decisions under Title VII, and the position of the Equal Employment Opportunity Commission, indicate that policies affording different treatment for temporary disability due to pregnancy than for all other non-work related disabilities is discrimination based on sex. However, it is asserted that the recent United States Supreme Court decision in *Geduldig* v. *Aiello*, ... U.S. ....., 41 L.Ed.2d 256, ... S.Ct. ..... (1974), determined that disparity of treatment between pregnancy related disability and other disabilities does not constitute sex discrimination. The primary source for defendant's argument is found in footnote 20 to the Court's opinion.

If defendant's reliance on the *Geduldig* decision were proper, then it would not be necessary to consider other cases in this area. For the reasons stated below, the court concludes that defendant's reliance on the *Geduldig* decision is not well founded.

In *Geduldig* the sole question presented was whether classifications under a disability insurance program established and administered under the laws of California violated the Equal Protection Clause of the Fourteenth Amendment. The asserted constitutional violation was based on the exclusion of disabilities in connection with normal pregnancies from coverage under the insurance program. The United States Supreme Court held that the exclusion of normal pregnancies from benefit coverage did not involve improper state action. The standard applied by the Court to test the constitutional question was one of "reasonableness." There was no question concerning the legitimacy of the state's action in establishing the disability insurance program to supplement the workman's compensation program. The analytic key to the *Geduldig* decision is found in the following language:

> This Court has held that, consistently with the Equal Protection Clause, a State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others . . ." * * * Particularly with respect to social welfare programs, ***so long as the line drawn by the State is rationally supportable,*** the courts will not interpose their judgment as to the appropriate stopping point. "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." * * *. (41 L.Ed.2d 256, 263-264. [emphasis added])

In finding a rational basis for the exclusion of normal pregnancies under the California disability insurance program, the Court noted several factors relating to the fiscal soundness of the program which were found sufficient.

It should be noted that *Geduldig* did not involve an assertion of unlawful action under the Civil Rights Act of 1964. The plaintiff in *Geduldig* was not an employee nor prospective employee claiming unlawful discrimination by reason of the State's employment practices. The question of whether the California disability insurance program sufficiently affects interstate commerce so as to be subject to the Civil Rights Act of 1964 does not appear to have been litigated.

In discussing the rational basis of California's exclusion of pregnancy benefits, the Court referred to the cases of *Reed* v. *Reed*, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251, and *Frontiero* v. *Richardson*, 411 U.S. 677, 36 L.Ed.2d 583, 93 S.Ct. 1764. Both of these cases were brought under the Equal Protection Clause of the Fourteenth Amendment and in each case the Court found there was no rational basis for discrimination. In the *Reed* case the Court found a provision of the Idaho Probate Code giving preference to males in appointment of administrators to be violative of the Equal Protection Clause. Writing for the Court, the Chief Justice stated the test to be applied in Equal Protection type cases:

> . . . [T]his Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. * * * The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation

> to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (30 L.Ed.2d 225, 229).

In the final analysis the Court concluded that the Idaho statute had no rationale sufficient to sustain the different classifications established for men and women.

In the *Frontiero* decision the Court again found there was no rational basis for the distinction drawn in the payment of benefits between male and female members of the military services.

The standard applicable to state action under the Equal Protection Clause of the Fourteenth Amendment is distinct from the lawful power of Congress to establish different standards for conduct affecting interstate commerce. Under the Commerce Clause the Congress has plenary power to regulate all aspects of interstate commerce. *Gibbons* v. *Ogden*, 9 Wheat (22 U.S.) 1, 6 L.Ed. 23 (1824); *United States* v. *Darby*, 312 U.S. 100, 85 L.Ed. 609, 61 S.Ct. 473 (1941); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 13 L.Ed.2d 258, 85 S.Ct. 348 (1964); *Maryland* v. *Wirtz*, 392 U.S. 193, 20 L.Ed.2d 1020, 88 S.Ct. 2017 (1968). In effect Congress has established a standard for testing employment discrimination that goes beyond the standard of "reasonableness" traditionally applied to the States under the Equal Protection Clause of the Fourteenth Amendment.

To further illustrate the distinction between the two standards of permissible discrimination, it is helpful to consider the legislative history of Title VII. Title 42 U.S.C. Sec. 2000e, et seq. presents the standard to be applied in cases of employment discrimination. In 1972 Congress

amended Title VII by deleting a portion of 42 U.S.C. Sec. 2000e(c) which originally provided:

> . . . but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance. . .

The effect of the 1972 amendment was to broaden the scope of Title VII and extend the employment standard to the States.

The case of *Maryland* v. *Wirtz, supra*, demonstrates the power of Congress under the Commerce Clause to prescribe the standard against which conduct will be gauged if that conduct affects interstate commerce. In noting that States are susceptible to the congressionally prescribed standards, the Court stated:

> But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulations. (20 L.Ed.2d 1020, 1031)

The congressional standard to be applied under the Civil Rights Act of 1964 is stated in 42 U.S.C. Sec. 2000e-2 for those cases alleging discriminatory employment practices. The only exception to the standard that could have relevance in the instant case is found in 42 U.S.C. Sec. 2000e-2(e)(1) which provides that a classification based on sex, etc., is permissible if there is:

> . . . a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . .

In light of the *Maryland* v. *Wirtz* decision, *supra*, it would appear that the proper standard to be applied in all employment discrimination cases properly brought under Title VII is the congressionally mandated standard outlined above.

All sex discrimination cases do not fall within the same category. As this discussion has illustrated, there are at least two classifications of sex discrimination cases: those arising under the Equal Protection Clause of the Fourteenth Amendment and those arising under Title VII of the Civil Rights Act of 1964. These two categories involve the application of different standards for the determination of whether distinctions based on sex are permissible. Under the Equal Protection Clause there need be only a "reasonable basis" for the legislative determination. However, under the Civil Rights Act of 1964, there must be an actual business necessity for employment policies that discriminate on the basis of sex. See *Moody* v. *Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973); *Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971); *Williams* v. *American St. Gobain Corp.*, 447 F.2d 561 (10th Cir. 1971).

The *Geduldig* case was brought under the Equal Protection Clause and not under Title VII. Thus, the standard involved was one of legislative reasonableness. Since *Geduldig* was not an employment case, it would be improper to draw a negative inference as to the power of Congress to establish a different standard of permissible discrimination for employers admittedly affecting inter-

state commerce.[1] For these reasons, defendant's contention that *Geduldig* controls in the instant case is rejected.

In the opinion of this court, defendant's employment practices are discriminatory in the following respects: (1) only pregnant women are required to take leave and thereby lose job bidding seniority and no leave is required in other non-work related disabilities; and (2) only pregnant women are denied sick leave benefits while in all other cases of non-work related disability sick leave benefits are available. *Dessenberg* v. *American Metal Founding Co.*, 8 FEP Cases, 291 (D.C. Ohio); *Hutchison* v. *Lake Oswego School District*, 375 F.Supp. 1056 (1974); *Gilbert* v. *General Electric Co.*, 375 F.Supp. 367 (1974). Defendant has introduced no proof of any business necessity in support of these discriminatory policies. The court must therefore assume no justification exists.

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1. In *Geduldig* the minority opinion indicates a willingness to impose the congressional standard manifest in Title VII as the appropriate test under the Equal Protection Clause. The minority opinion further indicates a willingness to find State classifications based on sex to be unconstitutional *per se*. However, the majority opinion expressly relies on the "rational basis" formula as set forth in the traditional line of cases under the Equal Protection Clause. The dispute within the Court in *Geduldig* does not appear to be whether California's statute discriminates on the basis of sex, but rather the dispute focuses on whether that discrimination is permissible under the Fourteenth Amendment, i.e., it is a question of legislative reasonableness. The dissenting opinion ultimately rests on the conclusion that the State lacked a rational basis for the distinctions drawn. References to the provisions of Title VII and Equal Employment Commission decisions and regulations by the minority appear to furnish fuel for the proposition that the standard of reasonableness under the Equal Protection Clause should be strengthened to conform with the congressional statement of policy. Rejection of that argument by the majority does not rationally suggest that the standard established under Title VII is weakened or in any way diminished in a case properly brought under the Civil Rights Act of 1964.

III.

Plaintiff further alleges that defendant's action in not holding her job open for her while she was on pregnancy leave constitutes discrimination based on sex. This allegation must be considered in light of certain business factors.

Plaintiff's principal duties prior to being placed on maternity leave involved the posting of merchandise accounts. It appears that defendant was considering prior to plaintiff's pregnancy, and has now initiated, the transfer of certain accounting functions to its computer processing department. Further, defendant has undertaken to discontinue its merchandise business. Both of these factors suggest a legitimate basis for the decision not to hold plaintiff's job open in the accounting department. The court discerns no discriminatory conduct by defendant with reference to this issue.

IV.

It is further asserted that defendant's action in requiring plaintiff to begin her pregnancy leave on December 29, 1972, was arbitrary and in violation of Title VII.

Although defendant's "Employee Policy Manual" suggests that pregnancy leave commence during the fourth month, actual practice shows that no set time is arbitrarily established to determine when leave shall be taken. Defendant's Vice President-Personnel has stated that several factors are weighed when reaching the decision to start pregnancy leave. These factors include: the opinion of the employee's doctor; the employee's duties; work area; and degree of public contact. Although the Vice President-Personnel was to be the final judge of when these factors should dictate the commencement of leave, there is no showing of abuse in reaching that decision.

Following employee holidays on Friday, December 22, and Monday, December 25, 1972, plaintiff failed to report for work on the next four consecutive work days. The proof shows that she was having a problem with water retention at that time and that she also had a common cold. After being placed on maternity leave on December 29, 1972, plaintiff gave birth to her child on January 23, 1973, some twenty-five days after maternity leave had commenced.

It is of paramount significance that defendant's policies as actually practiced do not fix an arbitrary month or date on which pregnancy leave must begin. The facts in each situation are considered on an individual basis. Given plaintiff's problem with water retention and the subsequent birth of her child on the 25th day of maternity leave, defendant's action does not appear to be arbitrary or irrational. See *Cleveland Board of Ed.* v. *LaFleur*, 414 U.S. 632, 39 L.Ed.2d 52, 94 S.Ct. 791 (1974).

V.

A further issue in this cause is whether the termination of plaintiff's temporary employment on April 13, 1973, was in retaliation for her complaining about defendant's employment policies with respect to pregnancy.

Plaintiff returned to work with defendant as a temporary employee on March 14, 1973. It was defendant's policy to place women returning from maternity leave in available temporary positions until a permanent opening was awarded on the basis of job bidding. Plaintiff worked as a temporary employee until April 13, 1973, when the temporary project to which she was assigned was completed. Plaintiff continued to apply for permanent job positions but was frustrated in her efforts by those policies

causing her to lose credit for accumulated seniority in job bidding. The court finds no evidence of retaliatory termination of plaintiff for assertion of her civil rights. However, it is clear that plaintiff's termination request was the result of her inability to retain permanent employment following forfeiture of her job bidding seniority rights by defendant.

VI.

The court concludes that plaintiff is entitled to the following relief:

1. Recovery of sick leave benefits that should have been paid during her maternity leave. Plaintiff is also entitled to have sick leave benefits credited and accumulated from the time she returned from maternity leave on March 14, 1973.

2. Back wages from March 14, 1973, until the present. The back wages shall be computed on the rate of pay earned by plaintiff on December 29, 1972, plus any across the board increases which may have occurred since that time. However, back pay will be reduced by amounts paid for temporary work with defendant, unemployment compensation received from the State of Tennessee, and wages from other employment.

3. Reinstatement as a permanent employee as of the date that the first permanent position after March 14, 1973, was filled with another employee having less seniority than plaintiff. Plaintiff will be credited with full seniority from the date of her initial hiring by defendant.

4. Recovery of reasonable attorney's fees.

The court authorizes the defendant to submit affidavits concerning plaintiff's status upon reinstatement. If there

has been a reduction in force by defendant which would have caused plaintiff's termination sometime after March 14, 1973, based on seniority computed from the date of her initial hiring, that fact may be shown to properly adjust the relief awarded plaintiff. Such affidavits should also reflect applicable "bumping" procedures, if any, to clarify whether or not plaintiff would have been entitled to a lesser position in defendant's company. Defendant may submit other data relating to the entitlement of plaintiff under the terms of this memorandum. However, defendant shall furnish copies of such affidavits to plaintiff's counsel and plaintiff shall have an opportunity to respond. The court will review such affidavits as are submitted relative to the determination of plaintiff's reinstatement and back wages, and if any material issue of fact is presented, a further hearing will be ordered on that matter. Defendant is allowed fifteen (15) days for the submission of affidavits and plaintiff shall have ten (10) days following defendant's submission to file counter-affidavits.

Counsel for plaintiff will submit an order consistent with the provisions of this memorandum.

(Caption Omitted)

STIPULATIONS

(Filed November 20, 1974)

Pursuant to the Memorandum of the District Court for the Middle District of Tennessee filed November 4, 1974, wherein it was ordered that the Plaintiff receive certain specific relief, in lieu of the affidavits provided for therein, the parties stipulate as follows:

1. Whereas the Court determined that the Plaintiff was entitled to sick leave benefits during her maternity

leave, the amount of the sick leave benefits which had accrued to her was $732.16.

2. Whereas the Court determined that the Plaintiff was entitled to have sick leave benefits credited and accumulated from the time she returned from maternity leave on March 14, 1973, Plaintiff will be credited with sick leave benefits in the amount of four (4) weeks at full pay and eight (8) weeks at one-half (1/2) pay.

3. Whereas the Court found that the Defendant did have a legitimate basis for not holding Plaintiff's job open during her maternity leave but that Plaintiff was entitled to reinstatement as a permanent employee as of the date that the first permanent position after March 14, 1973 was filled with another employee having less seniority than Plaintiff, Plaintiff is entitled to reinstatement as of April 2, 1973, the time at which the first employee with less seniority than Plaintiff was placed in an open permanent position for which Plaintiff was qualified. Plaintiff will be credited with full seniority from her date of initial hire, March 24, 1969.

4. Plaintiff shall recover back wages. This amount computed from April 2, 1973 until November 15, 1974 is $13,060.00. The Court provided, however, that the back pay be reduced by any amounts paid for temporary work with Defendant during this time, any unemployment compensation received from the State of Tennessee or any wages from other employment. From April 2, 1973 until April 15, 1973, plaintiff received $261.60 from Defendant for temporary work. From April 2, 1973 until November 15, 1974 Plaintiff received $1,674 for unemployment compensation, and during this same period Plaintiff received $1,668.19 from other employment. The total amount for which back pay should be reduced is $3,603.79. This leaves a total of $9,456.21 back pay for which Plaintiff is entitled

for the period April 2, 1973 to November 15, 1974 Social Security due on this amount by plaintiff is $553.19, and withholding tax is $1,154.99 for a total of $1,708.18, which amount should be deducted from Plaintiff's gross back wages and paid to the United States Government for plaintiff's benefit by defendant along with matching Social Security fund. The total amount to be paid directly to Plaintiff as of November 15, 1974 is $7,748.03.

5. Whereas the Court determined that the Plaintiff was entitled to be credited with full seniority from the date of her initial hiring by Defendant, Plaintiff will be credited with full seniority from March 24, 1969 for all purposes in which seniority is a factor including the Company retirement plan.

6. Whereas the Court determined that the plaintiff was entitled to recovery of reasonable attorneys' fees, plaintiff is entitled to recover $3,000.00, her reasonable attorneys' fees.

(Caption Omitted)

ORDER

(Filed November 20, 1974)

In accordance with the Memorandum filed November 4, 1974 in this matter, which is incorporated herein by reference, the agreed stipulations of the parties, and the entire record in this cause, it is ORDERED

1. That plaintiff recover sick leave benefits that should have been paid during her maternity leave in the amount of $732.16.

2. That plaintiff be credited with sick leave benefits from the time she returned from maternity leave on March

14, 1973 which are benefits in the amount of four (4) weeks at full pay and eight (8) weeks at one-half pay.

3. Defendant shall reinstate plaintiff as a permanent employee as of April 2, 1973, the date the first permanent position after March 14, 1973 was filled with another employee having less seniority than plaintiff. Plaintiff will be credited with full seniority from the date of her initial hiring by defendant.

4. That plaintiff recover back wages from April 2, 1973 until November 15, 1974, reduced by amounts paid her during this period for her temporary work with the Nashville Gas Company, her employment elsewhere, her unemployment compensation, withholding and social security benefits. This is a total amount of $13,060.00, reduced by $5,311.97, for a total due plaintiff for back wages of $7,748.03.

5. Plaintiff is to be credited with seniority from her original date of hire, March 24, 1969, for purposes of the Company retirement plan.

6. Attorney's fees are awarded to Robert W. Weismuller, Jr. and Tom H. Williams, Jr. in the amount of $3,000.00.

7. All of the foregoing Order is hereby stayed for a period of ten (10) days and thereafter pending appeal from this Order if, during said ten (10) day period defendant, Nashville Gas Company, files bond in the amount of $30,000 with a good and sufficient surety.

Defendant shall pay the costs of this cause, for which execution may issue if necessary.

TRANSCRIPT OF PROCEEDINGS

(Filed December 23, 1974)

* * *

[3] July 10, 1974

By the Clerk: Is the plaintiff ready?

By Mr. Williams: The plaintiff is ready.

By Mr. Wray: The defendant is ready.

By the Court: Put on your proof. I have read your file.

By Mr. Williams: Call Nora D. Satty.

MRS. NORA D. SATTY, having first been duly sworn, was thereupon called as a witness and testified as follows, to wit:

Direct Examination

By Mr. Williams:

Q. Mrs. Satty, were you ever employed by the Nashville Gas Company? A. Yes, sir.

Q. During what period?

By the Court: The defendant has filed an affidavit here that sets forth the employment dates, and they are—let me see, now, let's be sure we have it right.

All right, she was hired by the company as a junior clerk in the Customer Accounting Department on March 24, 1969; was promoted to clerk on December 22, 1969; continued to hold the position until December 29, '72 when she was placed on pregnancy leave; she returned on a temporary [4] basis—rather, she returned and they put her on a temporary employment status; her child was born on January 23rd; she was granted leave commencing December 29th, '72.

Let's see when it says she returned.

By Mr. Wray: It's on the third page, Your Honor, March 15th.

By the Court: Oh, March 14th, '73, she returned and was paid one hundred and thirty dollars and eighty cents per week as a temporary employee, and her employment was terminated, temporary employment terminated on April 13th, '73, is that right?

A. Yes, sir.

By the Court: We saved a lot of time. Go ahead.

By Mr. Williams: Yes, sir.

By Mr. Williams: (Continuing)

Q. During the period from 1969 to 1972, did you have occasion to receive sick pay benefits from Nashville Gas Company? A. No, sir.

Q. Pardon? A. What was the question?

Q. During the period from 1969 until 1972, did you have occasion to receive sick pay benefits from Nashville Gas Company? A. Yes, sir.

[5] Q. How often? A. Two or three times.

Q. Were you ever hospitalized? A. Yes, sir.

Q. Did you receive sick pay benefits on each of these times? A. Yes, sir.

By the Court: How many times were you hospitalized?

A. Three times.

By Mr. Williams: (Continuing)

Q. About what was the maximum period you were ever out from work during this time prior to the birth of your child? A. Approximately two weeks maybe.

By the Court: Now, wait a minute, two weeks at one time or two weeks total?

A. Two weeks each time.

By the Court: Two weeks each time, all right.

By Mr. Williams: (Continuing)

Q. Upon returning to work after these periods of disability, was your pay rate the same as it had been prior to your leaving? A. Yes, sir.

Q. Was your seniority the same it had been prior to leaving during this period of sickness? [6] A. Yes, sir.

Q. When did you become aware you were pregnant in 1972? A. After I had been to the doctor and I was about four months pregnant.

Q. Pardon? Speak up, please. A. Around August.

Q. When did you tell Nashville Gas Company about being pregnant? A. As soon as I found out.

Q. Was this a planned pregnancy or accidental pregnancy? A. Accidental.

Q. Were you aware of Nashville Gas Company's policy toward pregnancy prior to the time you found out you were pregnant? A. Yes, sir.

Q. How were you aware of this policy? A. By company manual.

Q. Mrs. Satty, I show you a copy of what purports to be an employee policy manual and ask you if this is the one which you claim sets out pregnancy leave policy? A. Yes, sir.

Q. Is this a copy of the one that was in effect in 1972? A. Yes, sir.

[7] By the Court: Exhibit No. 1. Let it be filed.

(Marked and Filed Plaintiff's Exhibit No. 1)

By Mr. Williams: (Continuing)

Q. Does it also include the sick pay plan? Does the manual also include the sick leave plan? A. Yes, sir.

By the Court: Have you seen this, gentlemen?

By Mr. Wray: Yes, Your Honor.

By Mr. Williams: (Continuing)

Q. After you informed Nashville Gas Company you were pregnant, were other employees hired to take your place while you were pregnant? A. Yes, sir.

Q. Prior to your leaving for pregnancy leave? A. They were hired before I left.

By the Court: Well, now, the affidavit says her position was never filled. Are you saying it was filled?

By Mr. Williams: Yes, Your Honor, we are.

By the Court: All right. You had better find out how she knows.

By Mr. Williams: (Continuing)

Q. When you returned to work as a temporary employee, was somebody doing the work you had been doing as a full-time employee? A. Yes, sir.
sir.

[8] Q. Were they doing it regularly? A. Yes, sir.

Q. Every day? A. Yes, sir.

Q. Did the Nashville Gas Company tell you whether they intended to follow the policy set forth in the company manual concerning your pregnancy?

By the Court: Who, when and where? We don't want the janitor telling her.

By Mr. Williams: (Continuing)

Q. Who did you talk to about working for Nashville Gas Company while you were pregnant? A. I talked to Mr. McCord, my supervisor and Mr. Hinson, the personnel director.

Q. Did either of them tell you that you could continue to work as long as it was healthy for you? A. With a doctor's statement saying that we were healthy to work, they allowed us to work.

Q. When were you terminated by Nashville Gas Company? A. The 29th of December.

By Mr. Wray: Your Honor, I'm having a hard time hearing the witness.

By the Court: Go to the jury box. Is that all right?

By Mr. Wray: Yes, sir.

By the Court: Terminated on December 29th she said, [9] is that right, December 29th? A. December 29th, '72.

By Mr. Williams: **(Continuing)**

Q. What were the circumstances that led up to your being terminated on December 29th? A. Christmas vacation, and I was off sick shortly after Christmas, and Mr. Hinson called me at home and asked me how I was feeling and did I think it was time to start my pregnancy leave.

Q. And what did you say to this? A. I told him that I would rather work on, but if that's the way he wanted it, I would, you know, start my leave.

Q. Had your doctor advised you to quit work yet? A. No.

Q. During the period you were sick, directly after Christmas, had you called in and informed people at Nashville Gas Company you were sick and that's why you didn't come in? A. Yes.

Q. Prior to being terminated, what was your job description? A. Clerk.

Q. What were your duties? A. Just general office duties. I was the merchandise clerk. I done answering telephone, posting, bookkeeping, [10] posting of merchandise, typing.

Q. All right, what was your rate of pay? A. At this time I was making standard pay, one hundred and forty dollars and some odd cents a week.

By the Court: The affidavit says one hundred forty dollars and eighty cents a week.

By Mr. Williams: (Continuing)

Q. Were there any step raises or seniority raises for being in the job for a length of time which added to this? A. That was with the step raises.

Q. That was with the step raises— A. Yes.

Q. —you were making one hundred and forty dollars and eighty cents? A. Yes, sir.

Q. I show you a schedule of the salary rates effective August 14th, 1972. Is your job—would the job description Clerk Standard fit what you were doing and your rate of pay? A. Yes, sir.

By Mr. Williams: I would like to make that an exhibit.

By the Clerk: Exhibit No. 2.

(Marked and filed Plaintiff's Exhibit No. 2)

By Mr. Williams: (Continuing)

Q. Prior to leaving Nashville Gas Company on December 29th, 1972, to begin your pregnancy leave, did you tell anyone [11] you intended to return to work after the birth of your child or you hoped to return to work? A. Yes, sir.

Q. Who did you tell? A. My supervisor, Mr. McCord. I believe I also talked to Mr. Hinson about it.

Q. Did either of them ever give you any instructions as to what to do when you were ready to come back to work? A. To give them a call.

Q. All right, when did you have your baby? A. January 23rd, '72.

By the Court: '73.

A. '73 excuse me.

Q. Did you apply for sick leave benefits for this period of pregnancy leave? A. No, sir.

Q. Why not? A. I don't think I was eligible to draw it.

Q. Why did you think that? A. According to company policy.

Q. Were you paid any sick leave benefits for this pregnancy period?

By the Court: I don't imagine she was. She didn't apply for them.

By Mr. Williams: (Continuing)

[12] Q. Were you covered under the company's group health insurance? A. Yes, sir.

Q. Had you been covered under this insurance during your other disabilities? A. Yes, sir.

Q. Was the coverage the same as it had been for your other disabilities? A. No, sir.

Q. Well, in what way was it different? A. It didn't pay as well as the other disabilities.

Q. When did you advise Nashville Gas Company you wished to return to work? A. Just right after the child was born.

Q. And what did they say? Who did you talk to there? A. I called Mr. Hinson just a few days after the child was born, and I also called Mr. McCord, and both of them advised me to give them a call after my six weeks' checkup.

Q. Did you call them after your six weeks' checkup? A. Yes, sir.

Q. Had your doctor okayed you to go back to work? A. Yes, sir.

Q. What happened when you called after the six weeks' checkup? A. I called to talk to Mr. McCord, and he was on [13] vacation or he wasn't in the office, and a Mr. Jerry Mason, had tried to call me, and he said that Mr. McCord wanted me to come back in to work.

Q. Did he tell you whether this work would be full time or temporary? A. Yes, he told me it was temporary.

Q. What was your rate of pay? A. I would start out entrance clerk.

Q. How much is that?

By the Court: One hundred and thirty dollars and eighty cents.

By Mr. Williams: (Continuing)

Q. How are job vacancies which come open at Nashville Gas Company filled?

By the Court: How are what?

By Mr. Williams: Job vacancies that come open at Nashville Gas Company, how are they filled?

A. With the employees of the company by bidding on the jobs.

By Mr. Williams: (Continuing)

Q. How were these bids evaluated, do you know? A. By seniority and experience.

Q. Did any jobs come open while you were a temporary employee? A. Yes, sir.

[14] Q. What jobs were they? A. There were three jobs; one was a switchboard; one was a teller in the cashier's department; and the other was a clerk in the credit department or heating service department, it was called.

Q. Did you have experience, similar type jobs or similar duties to these three jobs you have just described? A. I had some experience that I feel like that I possibly could have done the jobs.

Q. Now, the job. . . .

By the Court: Did you bid?

A. Yes, sir.

By Mr. Williams: (Continuing)

Q. The job of clerk in the heating department, did you bid on that job? A. Yes, sir.

Q. Do you know the girl who got the job? A. Yes, sir.

By the Court: The job in what department?

By Mr. Williams: Heating.

By the Court: Which one was that, switchboard, teller or clerk?

A. Clerk.

By Mr. Williams: Clerk.

By the Court: All right. I thought she said the [15] credit department. Was it the heating department?

A. It was called the heating service department; that was the title given to it.

By the Court: All right.

By Mr. Williams: (Continuing)

Q. Do you know how long she had been with the Nashville Gas Company? A. Three or four months.

By the Court: When you are laid off on temporary employment, are you ever in a position to bid on a job?

A. I did bid on the jobs.

By the Court: I mean, after you were laid off, after April the 19th, have you bid on jobs since then?

A. No.

By the Court: If you are not an employee, you can't bid on a job?

A. Well, I was considered not an employee when I was temporary, but when I was laid off from temporary duties from the temporary work they hired me for, I hadn't bid on any jobs since then.

Of course, the only way I happened to know about it, I would be up there—of course, my husband works with the company, and he might tell me jobs that are up for bid.

By the Court: Has he told you since you were laid off [16] in April?

A. Yes, sir.

By the Court: And you have not bid on them?

A. No, sir. I didn't think I was eligible to bid on them.

By the Court: Well, you have. . . .

A. I did call in and talk to Mr. Crew Anderson, vice president of the company, asking him about the jobs available and why hadn't I been called for any of them.

I was under the understanding when I left I would be called.

By the Court: Well, now, I haven't read this manual, so I don't know what is in it, but beginning on January the 23rd—well, six weeks after January 23rd, or when was it you went back then?

A. March.

By the Court: From March until April you had—when you were fired, you had about a month's seniority, didn't you? Under their theory?

A. Under their theory, yes, sir.

By the Court: All right, wouldn't that give you a right to bid on new jobs that became available for anybody?

A. I did bid on those three jobs.

By the Court: I know, that's while you were still there.

A. Right.

[17] By the Court: Well, suppose a job came up today, you have got a month's seniority, haven't you?

A. I have close to four years seniority.

By the Court: No, no, I mean under their theory. I know you claim your seniority goes all the way back. They claim, as I understand it, your seniority began on—in March.

Now, do you know whether or not they have hired any new people up there who were not working period on these jobs from April up to date?

A. They have hired people.

By the Court: Off of the street?

A. Right.

By the Court: And you have had no opportunity to bid on those jobs?

A. No, sir.

By the Court: All right.

By Mr. Williams: (Continuing)

Q. Now this job, this clerk's job, Mr. Hinson in his statement to the Court states that this job was eliminated. Do you know whether it was or not and if so when? A. Heating service or clerk's job in credit department?

Q. Right. A. When I was working temporarily, the job was filled. Should I call names?

[18] By the Court: Oh, sure.

A. The job was filled by Glenda McAbee. She was hired before I left on my pregnancy leave in December. I don't know exactly the date she was hired, but she was hired.

She was there for three or four months, and she—when I come back temporarily, the job went up for bid and she was hired for the job. She went downstairs to the downstairs credit department and started to learning the job.

By the Court: And you are saying that the job continued up until the time that you left there on April the 19th?

A. While I was working temporary, the job was up for bid, a girl bid on it. She went to work on the job. After a few weeks or so she turned the job down then and went back to her old position.

By the Court: Who has got the job now?

A. No one. They never filled it since then.

By the Court: They haven't filled it since then.

By Mr. Williams: (Continuing)

Q. But they originally filled it with Glenda McAbee, is that right? A. Yes, sir.

Q. Did you bring the fact that people were getting jobs you felt you were entitled to to your superiors' attention? A. Yes, sir.

Q. Who in particular? [19] A. My supervisor, Mr. McCord.

Q. When did you first do this? A. Right after Miss McAbee got this job, I brought it to his attention, because she was a junior clerk, that is, a beginning job with the Gas Company, and I was under the understanding by the policy that if I was to be hired back full time, I would begin as a junior clerk, and she was a junior clerk.

And I asked about her job, if I could be hired for it, and then they said they were not going to hire for that job.

Q. Did you complain about being a temporary rather than a full-time employee? A. Yes, sir.

Q. Did you tell them you didn't think it was right? A. Yes, sir, I even pointed out that I couldn't find anything in the manual about it.

Q. How long after this were you terminated by Nashville Gas Company? A. Around mid-April.

Q. How long was this after your discussion with Mr. McCord about you didn't think it was fair the way they were treating you? A. Just a few days after I said something, I was relieved from my temporary duties.

[20] Q. When you were laid off, did you tell them you wanted to be considered for any job openings that came up? A. I told Mr. Hinson this.

Q. You told Mr. Hinson this. What did Mr. Hinson say? A. He said that I was the first girl amongst the

three that were pregnant to leave, and I would be the first called back.

Q. Did you later ask to be released from your leave of absence from the company, from Nashville Gas Company?

By the Court: I don't understand that question. When was she on leave of absence?

By Mr. Williams: They call it a leave of absence or lay-off after April 19th, Your Honor.

By the Court: Well, I don't like the term.

A. They considered it still a pregnancy leave. I have—from December 29th, 1972, when I left on a pregnancy leave then, they—you have a year from that date until you can be hired back with the company as a pregnancy leave. I came back to work, wanted to come back to work in March, and then I was temporary when I come back then, but, see, they grant you a year's leave of absence due to pregnancy.

By the Court: Well, do you lose your seniority during that year?

A. Not supposed to if you are hired back within the year.

[21] By the Court: I am lost.

A. If you are hired back with the company within the year before the year is up, you gain your seniority from the prior years plus the time you start back temporarily or start back to work. Like I started back in March, if I had been hired on regular, I would have had my seniority from the time I started in 1969 up until I was hired back on in March and then it would carry on from there.

By the Court: All right.

By Mr. Williams: (Continuing)

Q. Did you write a letter to Nashville Gas asking to be relieved from your leave of absence? A. Yes, sir.

Q. Why did you do this? A. Mr. Hinson requested that I write a letter.

Q. For what reason? A. He said that he would need a letter to relieve me from my leave of absence, to enable me to draw unemployment benefits.

Q. So you did this to draw unemployment benefits? A. Yes, sir.

By the Court: Who is Mr. Hinson? What job does he have with the company?

A. He's personnel director.

By the Court: Did you call him or did he call you [22] about writing this letter?

A. I believe I called him or I talked to him about it.

By the Court: About what?

A. Drawing my unemployment from the company.

By the Court: You initiated the conversation?

A. I believe so.

By Mr. Williams: (Continuing)

Q. Is that a copy of the letter that you yourself wrote out? A. Yes, sir.

Q. Would you make it an exhibit, please? A. Yes, sir.

By the Clerk: Plaintiff's Exhibit No. 3.

(Marked and Filed Plaintiff's Exhibit No. 3)

By Mr. Williams: (Continuing)

Q. Did Mr. Hinson make some small changes in the letter and have it typed up for you to sign? A. Yes, sir.

By Mr. Williams: Now, Your Honor, a copy of that signed is attached to the affidavit of Mr. Hinson. We also have a copy of the letter as typed.

There is a copy attached to Mr. Hinson's statement or affidavit. We will introduce another copy if you wish.

By the Court: That's fine.

[23] By Mr. Williams: (Continuing)

Q. In September of 1973, did you file a complaint with the Equal Employment Opportunity Commission charging the Nashville Gas Company with sex discrimination? A. Yes, sir.

Q. Is this a copy of that complaint? A. Yes, sir.

Q. Will you make it an exhibit to your testimony? A. Yes, sir.

By the Clerk: Plaintiff's Exhibit No. 4, the complaint to the EEOC.

(Marked and Filed Plaintiff's Exhibit No. 4)

By Mr. Williams: (Continuing)

Q. In April, 1974, did you write the Equal Employment Opportunity Commission a letter stating you wished the investigation terminated? A. Yes, sir.

Q. Why did you do this? A. I had phoned several times and talked to them, and they said they had such a pile up of complaints that it would be a while before they would get to it. So, I asked or talked to this lady, and she told me that I could request it being sent and turned over to Federal Court or to go into Court and get myself a lawyer.

Q. Is this a copy of the letter that you sent them [24] asking that this be terminated? A. Yes, sir.

Q. Will you make this letter an exhibit to your testimony? A. Yes, sir.

By the Clerk: Plaintiff's Exhibit 5.

(Marked and Filed Plaintiff's Exhibit No. 5)

By Mr. Williams: (Continuing)

Q. Did you receive a letter from the Equal Employment Opportunity Commission in reply to your letter of April 1st? A. Yes, sir.

Q. Is this a copy of that letter? A. Yes, sir.

Q. Will you make it an exhibit? A. Yes, sir.

Q. Are you working now, Mrs. Satty? A. No, sir.

Q. You have no income from your work at all? A. I am drawing unemployment.

By the Clerk: Plaintiff's Exhibit 6.

(Marked and Filed Plaintiff's Exhibit No. 6)

By Mr. Williams: (Continuing)

Q. When were you and your husband married? A. March 15th, 1972.

Q. Did Nashville Gas Company know about y'all being [25] married? A. Yes, sir.

Q. Did anybody ever complain about it? A. I never heard one.

Q. Did anybody ever complain about your work while you were with Nashville Gas Company? A. No, sir.

By Mr. Williams: That's all of my questions.

By the Court: Cross-examine.

Cross-Examination

By Mr. Wray:

Q. Mrs. Satty, did you say no one ever complained about your work at Nashville Gas Company? A. What do you mean? Mr. McCord had talked to me once about personal phone calls is all the complaints; as far as my work was concerned, there was no complaints.

Q. Now, Mrs. Satty, just so I understand this, on or about May 10th, 1973, did you approach Mr. Hinson about having your status changed from pregnancy leave to terminated? A. Mr. Hinson—I either talked to Mr. Anderson or I talked to Mr. Hinson. I don't exactly—I believe I talked to several of them up there, Mr. Hinson, Mr. Anderson, Mr. Bollinger. I went in and talked to Mr. Anderson, and, of course, Mr. Anderson told me the same thing Mr. Hinson had, and he told me that I could come back to work temporarily. [26] This was after the mid-April, when I was relieved from my tempo-

rary duty or I could draw my unemployment, whichever I decided. I was still under the understanding at the time that I would come back as a junior clerk, not a clerk, and I assumed that it would be best maybe for me to try and find another job.

So, I ask for my separation slip to draw unemployment until I found a job.

Q. Did Mr. Hinson advise you against that course of action? A. Not exactly, no.

Q. What do you mean not exactly? Did he explain to you that you would no longer be in a preferential position in terms of a job opening if you were terminated? A. He did not tell me that, no.

Q. Did he advise you against it in any way? A. No, sir.

Q. You are sure about that? A. I am sure about that. Mr. Hinson told me that I was the first girl among the three to leave being pregnant, and that I would be called back first when there was a job opening; that's why I was under the understanding that I would be called for any jobs that were available after I left in mid-April.

Q. Well, I'm focusing your attention—is it correct that your temporary work ended on April 13th? That's the [27] last date for which you were paid, is that right? A. Yes, sir.

Q. Okay, you did not actually—were not placed on separated until May 10th, is that right? A. No, because I didn't write the letter and didn't go—the letter that I wrote, I don't exactly know the date that it was.

By the Court: May the 10th, 1973, is what is on here.

A. Okay.

By Mr. Wray: (Continuing)

Q. What I'm getting at is what Mr. Hinson told you at the time you told him you wanted to be terminated

in May. Did he not tell you that you would no longer be in a preferential position? A. No, sir.

Q. And he did not advise you against seeking that termination? A. This letter was to relieve me from a pregnancy leave and enable me to draw unemployment. He did not tell me nothing about I wouldn't be hired back or in a position to come back to work there, if I drew my unemployment, he didn't tell me that, no.

Q. And then did you start drawing unemployment? A. Yes, sir.

Q. For what period of time did you draw unemployment? [28] A. I signed up for unemployment in May and drew it for twenty-one months or weeks, excuse me, weeks, twenty, twenty-one weeks.

Q. Now, during the time after your unemployment compensation was ceased, did you get another job? A. Yes, sir.

Q. Where did you work? A. With the Bailey Company.

By the Court: What company?

A. The Bailey Company, Incorporated; it's 501 Cowan Street.

By Mr. Wray: (Continuing)

Q. How long did you work for the Bailey Company? A. I went to work December the 10th of '73, and was laid off from that job, around April.

Q. Why were you—you say "laid off"? A. Yes, sir.

Q. Was that because there was no work to do or were you terminated because of unsatisfactory performance?

By Mr. Williams: I object. I don't see how this is relevant to today's hearing.

By the Court: I don't either, but I will let her answer it.

A. I was hired for the position, because there was a young girl there pregnant, and she had to leave. I was [29] hired—they did not have no one to fill the job with any experience at that time, and I was hired for the job.

I had not had experience as a receptionist-secretary to five salesmen. I did my best at the job until they found someone else, and then they laid me off and hired another girl for the job.

Q. What were you earning while you were working for the Bailey Company? A. A hundred and ten dollars.

By Mr. Williams: Objection again, we are not asking about money damages today. I don't see how this is relevant.

By the Court: I may get this thing over with today. How much did you earn?

A. One hundred and ten a week.

By Mr. Wray: (Continuing)

Q. Now, Mrs. Satty, you have testified that you requested that you be terminated in order to draw unemployment compensation, is that correct?

By the Court: She has testified about that and I listened very carefully.

Now, if you want to go into the circumstances, fine, but don't go into an ultimate conclusion because I have heard it.

By Mr. Wray: (Continuing)

Q. Well, in your complaint, Mrs. Satty, you have [30] alleged, paragraph twelve, that "When plaintiff complained to defendant about her status as a temporary employee and the failure of defendant to place her in any full-time jobs for which she had applied, the plaintiff was terminated as an employee of defendant in violation of Section 704, Title VII of the Civil Rights Act."

Now, what I'm asking is isn't the reason you were terminated is because you requested to be terminated in order to draw unemployment compensation? A. I didn't request to be terminated, I just asked for whatever I needed, a slip to draw my unemployment until the company had an opening or until I found a job.

Q. Mrs. Satty, when you went on pregnancy leave, was it your understanding of the company policy that you would have the benefit of your prior seniority in terms of bidding for a job? A. Now, what was the question again?

Q. When you went on pregnancy leave with the Nashville Gas Company, was it your understanding of the company policy that you would have the benefit of your prior seniority in terms of bidding for a job at the end of your leave? A. When I went on pregnancy leave, I didn't have—I didn't believe that or didn't think that I had chances on bidding on a job until I come back from my pregnancy after the child was born.

[31] Q. Mrs. Satty, I am afraid. . . .

By the Court: Well, after you came back after your child was born, what did you understand the company policy was with respect to your right to bid on jobs?

A. There was nothing in the policies saying I could not bid on the jobs, so I did bid on the jobs.

By the Court: What was your understanding about what seniority you would take into the bids with you?

A. I assumed I would have the seniority I had before the child was born.

By the Court: All right, does that answer your question?

By Mr. Wray: Yes, Your Honor.

By Mr. Wray: (Continuing)

Q. Mrs. Satty, while you were working with Nashville Gas Company, were you familiar with any of your

co-workers who had gone on pregnancy leave and then returned and their situations in terms of jobs to which they returned? A. Since I started working there, I only know of three, possibly three women who had children.

One of these women did not return to work—well, two of these women did not return to work.

The third did return to work and was hired back on, but she was hired back on as a junior clerk, and she was a clerk when she left.

[32] Q. Well, . . .

By the Court: Did she stay there regularly after that time?

A. Yes, yes, sir.

By the Court: What was her name?

A. Diane Dailey.

By Mr. Wray: (Continuing)

Q. Mrs. Satty, you have testified about three jobs that you applied for, I believe, all in March of 1973? A. Yes, sir.

Q. And I believe the testimony is that each of those jobs went to another person? A. Yes, sir.

Q. And each of those other persons was a full-time permanent employee at the time they were given the new position, is that correct? A. Yes, sir.

Q. Now, did that result that the ones who had been working full time permanently while you were on a pregnancy leave and they got the job, did that result conflict with what you thought the company policy was? A. Now, what do you mean?

By the Court: Well, did that follow—did that procedure that they went through there as far as your theory of the company policy, did that follow the company policy?

[33] A. They hired the three women, as they were full time. They hired them for the positions, but, of course, after I come back just—I was temporarily, temporary, as they say, and I considered myself, I felt that my seniority could have counted on the jobs even if I wasn't full time, because there was nothing in our policy saying it shouldn't or couldn't.

By the Court: All right, she says that disagrees with her understanding of the policy because her seniority was more than the ones that bid on the job. Is that what you said?

A. Yes, sir.

By Mr. Wray: All right.

By Mr. Wray: (Continuing)

Q. Mrs. Satty, when did you first give thought about filing a charge with the EEOC?

By the Court: What difference does that make?

By Mr. Wray: Well, Your Honor, I think it makes two differences: one, she. . . .

By the Court: All right, I will let her answer it.

When did you first think about it? You filed it on September 31st, '73. When did you first think about it? Was it sometimes when you were out fishing?

A. I had been checking with Hour and Wage every way possible, what I could see about getting my job back with the company, and they told me the only place that I could go [34] was to the Equal Employment Opportunity which was in Alabama, so I wrote to them and got an application and filled it out and sent it in.

By Mr. Wray: (Continuing)

Q. When was that? You filed it in September? A. It was before September. I don't know exactly when.

Q. Well, was it in May when you left the Gas Company or was it sometime before you started making all of these inquiries? A. Between May and September.

I had been to several different places between May and September.

Q. Starting in May? A. When I signed up for my unemployment, I talked to them at the unemployment office. I talked to Hour and Wage. I went up to the State Office Building and talked to a man up there. I went to the Labor Board and talked to a Mr. McAlister or something there, and he was the one that introduced the law to me, the written statement law, and that's where I went from there, and he told me I would have to go to Alabama, whenever that was, and I don't know the exact date.

Q. At the time that you informed Mr. Hinson that you were pregnant, did he indicate to you that the company policy was to treat it on an individual basis and to consider your [35] doctor's opinion, your work assignment, your welfare, the welfare of the child and the welfare of the Gas Company? A. Mr. McCord and the two girls and myself—Mr. Hinson was in his office when he went over this with us, and allowed us to work on. He told us we would have to have a statement from the doctor. So long as the doctor thought it permissible to work, he would allow us to work according to our health and the welfare of the child, yes, and our own health.

Q. And did he tell you that ultimately he felt he would have to make the final decision as to when your pregnancy leave should commence? A. He made a remark that some women when they are pregnant get so big that they look miserable, and, some, of course, never show that they even think that they are pregnant, and that he would possible suggest, if he considered us being off sick a lot and things like this, yes, he said he would consult us when we take our leave.

Q. And Mrs. Satty, I did not understand on direct examination why were you absent? You were absent from work then the entire last week of December, 1972, were you not? A. Yes.

By the Court: She said she was sick and said she called in and told them she was sick.

By Mr. Wray: (Continuing)

[36] Q. What type of sickness was it? Was it a sickness associated with your pregnancy? A. No, sir. Well, part of it might have been. I had a cold, and also my doctor had given me fluid pills, and I had lost nine pounds of fluid right there at the last of December.

By the Court: It was pregnancy illness, I'll tell you it was. Go to the next one.

I am not a doctor, but I know what fluid pills are that they give to pregnant women.

By Mr. Wray: (Continuing)

Q. Do you know, Mrs. Satty, whether the maternity benefits provided under the company's group insurance plan were the same that were provided to the wives of male employees?

By the Court: She said—do you know whether or not that's true or not?

A. If the insurance for myself. . . .

By the Court: The insurance you got for being pregnant, as a result of being pregnant, is the same that a wife of another employee would get if she were pregnant?

A. Yes, sir.

By the Court: But are they different for anybody that broke a leg?

A. This insurance paid more if you broke your leg.

By the Court: If you broke your leg, all right.

[37] A. The insurance only pays half of a pregnancy.

By the Court: And it pays all of the other?

A. No, I'm not sure it pays—it pays a percentage of it, seventy percent or something like that.

By Mr. Wray: (Continuing)

Q. Mrs. Satty, were you aware of the Gas Company's policy prohibiting hiring members of the same immediate family? A. Yes, sir.

Q. Now, you and your husband. . . .

By the Court: Does the company say, however, that two employees can't get married, and if one gets married they are going to fire him?

By Mr. Wray: No, they do not.

By the Court: Good, I hope they don't say that.

By Mr. Wray: (Continuing)

Q. Were you aware when you were terminated on May 10, 1973, that that policy prohibited hiring of members of the same or immediate family became applicable?

By the Court: Well, I think you are getting very far afield in this lawsuit.

Now, let me just tell you something, this lawsuit, as far as I am concerned, boils down to the fact as to whether or not you can take a different attitude toward a woman who gets pregnant and a man who breaks his leg or [38] breaks his arm or is in the hospital for six months because of employment.

Now, I know that pregnancy normally is voluntary and I am aware of that fact, but we have long since passed that stage in this matter, and I think that you can see the tendency in the Courts, and particularly I think you can see it in the Supreme Court of the United States.

So, as far as I am concerned, this lawsuit is going to be determined not on the question of just pregnancy alone, but on the question of the attitude of the company insofar as someone who is injured—not on the job, but who has an automobile accident out here on the 4th of July while he is fishing. I want to know what the com-

pany's attitude is about whether or not he loses his seniority and whether or not he has to go through a year's leave of absence and what have you. Now, that's the lawsuit, gentlemen.

By Mr. Wray: Well, Your Honor, could I just say one thing?

Insofar as this is a hearing for a preliminary injunction. . . .

By the Court: Oh, well, I'm going to tell you, I'll be perfectly frank with you right now, I'm not going to—so far, based on her testimony, there is nothing I can't take care of at a final hearing and give her money if she's entitled to it.

[39] By Mr. Wray: That was my only point, Your Honor.

By the Court: Now, so far there has been no irreparable harm shown—

By Mr. Wray: I will cease this line of questioning.

By the Court: —that money can't take care of. So, she has got a husband who is working and apparently he's putting food on the table, at least enough for them to eat, and so far she hasn't shown anything that indicates irreparable harm.

By Mr. Wray: I'm through then. That was the only purpose of that line of questioning—

By the Court: All right.

By Mr. Wray: —was towards whether there was any irreparable harm that could not be cured by monetary damages.

By the Court: Most of these job cases, unless there is something awfully peculiar, money can take care of them.

Any redirect?

By Mr. Williams: No questions, Your Honor.

By the Court: All right, step down.

By the Clerk: Everyone rise, please, a fifteen minute recess.

(Thereupon Court Recess for Fifteen Minutes)

By the Court: All right, call your next witness.

By Mr. Williams: Call Shirley Freels.

[40] MRS. SHIRLEY FREELS, having first been duly sworn, was thereupon called as a witness and testified as follows, to wit:

Direct Examination

By Mr. Williams:

Q. Mrs. Freels, did you ever work for Nashville Gas Company? A. Yes, sir.

Q. While you were there, did you become pregnant? A. Yes.

Q. When was this? A. My baby was born April of '73, so nine months before that.

Q. All right. Then you were pregnant at the same time that Mrs. Satty was pregnant? A. Yes, I was.

Q. When did you leave work?

By the Court: Well, are you going to go through the same routine? Was she given the same basic treatment as your client?

By Mr. Williams: Yes, sir, she was, but I have some further questions.

By the Court: We will assume she was given the same basic treatment. Go to the next questions.

By Mr. Williams: (Continuing)

[41] Q. Were you ever re-employed by Nashville Gas Company? A. No.

Q. Did you ask them to re-employ you? A. Yes, I did.

Q. Did you ask for any sort of work they had? A. Yes, I asked for temporary or full time.

Q. What did they tell you? A. Well, I asked on two different occasions. The first time Mr. McCord said he would have to check and see how much I would get paid, so. . . .

By the Court: Have to check and see what?

A. See what I would get paid,—

By the Court: Um-hm.

A. —which, you know, I thought I should get paid what I was making when I left.

So, I called him back and I told him at that time—first he told me to call him back after my six weeks' checkup, so I did, and then when I called him back after the six weeks' checkup, that's when he said he would have to check on my pay.

And then I called him back, and I said at this time I'm too nervous about leaving my child, and, you know, I didn't even ask him what I would get paid, but I didn't assume that it would be what I should be making.

By Mr. Williams: (Continuing)

[42] Q. But at a further date, a future date after that time, you went and asked to be employed, right, re-employed? A. Right. It was—I think maybe my baby was four months old or so. I asked for temporary or full time.

And Mr. Hinson said there was no temporary or full time

So, I said, "Well, then, I would like to draw my unemployment if you are not going to hire me back."

He said, "Well, think about it and call me back."

So, I thought about it, and I did call him back, and I said, "I do want to draw my unemployment if you are not going to hire me back, because I need to go to work or do something."

Q. And what was his reaction to you telling him this? A. Well, he tried to talk me out of it. He said he would like to see me come back to work there, but there wasn't anything right now.

Q. Did he tell you—advise you against drawing unemployment as far as how it would affect you being employed by Nashville Gas Company in the future? A. He did say it would terminate me if I drew it, that it was their policy not to take anybody back after they drew their unemployment.

Q. When you worked at Nashville Gas Company, did you [43] know Mrs. Satty, did you work in close proximity to her? A. Yes, I did.

Q. Were you familiar with the duties of the job she had on December 29th of '72, when she left to have her baby? A. Yes, I did.

Q. Do you know if after that time someone has since —do you know of your own knowledge that someone has come in and started doing that job? A. Well, at the time that I was there, there was a full-time job and a person doing it full time, and even when I had come back to visit, I saw people sitting at that desk doing that job.

By Mr. Williams: That's all of my questions.

By Mr. Wray: I don't have any questions of this witness.

By the Court: Step down.

By Mr. Williams: That's the plaintiff's proof, Your Honor.

By the Court: All right.

By Mr. Wray: I would like to call Mr. Hinson.

By the Court: What for?

By Mr. Wray: Well, there is one point in his affidavit I want—I think needs clarification. I will state that for the record.

By the Court: All right.

[44] By Mr. Wray: On page three, the last—on the last page, the last sentence, it says, "The duties of Deposit Refund Clerk were transferred to another employee in the

Credit Department and accordingly that position was not filled."

I believe this came out in the plaintiff's testimony that the job. . . .

By the Court: She said it was filled part time and eventually it was terminated, boxed.

By Mr. Wray: Right.

By the Court: I got that.

By Mr. Wray: I think this was a little hard to comprehend on that one point.

By the Court: I caught it. I knew what was in the affidavit, and I heard her testimony.

All right, now, let me just say this one thing to you, I'm not going to issue a temporary injunction for the simple reason that is the principle relief sought in this case, and in addition to that there's no proof of irreparable damage for the simple reason that if this lady is entitled to be reinstated, I can reinstate her and give her back pay. So, there is no problem about that.

So, you can draw an order to that effect on the ground there is no proof of irreparable damage.

Now, I am going to set this case for hearing [45] right away. How much time do you need to get your interrogatories in, because if this girl is entitled to re-employment, she's going to get it. If not, she's not going to get it.

By Mr. Williams: Your Honor, we filed interrogatories the day we filed the lawsuit. I don't know how much time they need to answer it.

By the Court: Did you ask in there how they treat male employees who are either sick for non-work connected disability or who have accidents, non-work type accidents? If you didn't, file an interrogatory, because that's the thing I want to know.

By Mr. Williams: I believe we had that reserved for a second set of interrogatories. I think two sets should be more than sufficient for us to get our proof.

By the Court: How much time do you want?

By Mr. Williams: If they can get the second set back to us in two weeks, we should be ready in two weeks.

By the Court: Well, that's a little fast for me for my docket.

By Mr. Williams: I say, after we get our first set, we can prepare a second set.

By the Court: What time do we have available, Mrs. Cross? I will take one of those days off there. August 21st. All right, August 21st, gentlemen.

By Mr. Williams: Nine A.M.?

[46] By the Court: Nine A.M. Is that satisfactory, gentlemen?

By Mr. Wray: Fine with me, Your Honor. I believe that's all right with the defendant, Your Honor.

By the Court: Now, I think I have outlined to you the type of information I need, and that is how do you treat male employees who have illnesses that are non-job connected and accidents that are non-job connected. As far as I am concerned, that's dispositive of the lawsuit. If I am in error, you had better get me some law on it, because I think that's the approach of the Supreme Court of the United States on these sex discrimination cases, and so on that basis you see, you see what I think the law is, and if I am wrong, you had better tell me before we try the lawsuit.

By Mr. Wray: Do we file the normal pre-trial briefs?

By the Court: Oh, yes, yes, by all means, normal pre-trial briefs, and all of the proof that has gone in today will be a part of that record. It will not be necessary to re-introduce any of this proof at all.

So, about all the plaintiff will need to do then is read some answers to interrogatories and he can rest, and then the burden shifts to you.

All right, Mrs. Cross.

(Thereupon Court Adjourned)

[47] TRANSCRIPT OF PROCEEDINGS

September 5, 1974

By the Clerk: Is the plaintiff ready?

By Mr. Williams: Yes.

By the Clerk: Is the defendant ready?

By Mr. Wray: Yes.

By the Court: Plaintiff rests, is that right?

By Mr. Williams: No, Your Honor, there are just a few things we would like to bring out from Mrs. Satty's testimony and then some interrogatories we would like to enter in the record.

By the Court: All right.

MRS. NORA D. SATTY, having first been duly sworn, was thereupon called as a witness and testified as follows, to wit:

Direct Examination

By Mr. Williams:

Q. Now, Mrs. Satty, you were covered by the group insurance of Nashville Gas Company at the time you had your child, is that correct? A. Yes, sir.

Q. Now, Mrs. Satty, what expenses did you and your husband incur due to the birth of your child? A. The total expense or something?

Q. Well, how much was the doctor's fee, Mrs. Satty? [48] A. Three hundred dollars. It was three hundred and twenty, because the baby was a boy.

By the Court: Three hundred dollars for a girl and three hundred and twenty for a boy, is that what you are saying? That's a new one on the Court. I didn't know they made a difference.

By Mr. Williams: Yes, Your Honor, they charge extra for a circumcision.

By the Court: Okay, all right.

By Mr. Williams: (Continuing)

Q. How much was your room? A. For the total time I spent there, it was three hundred and forty-six ninety-five.

Q. And was this a semi-private room? A. Yes, sir.

Q. And how much was the child's room at the hospital? A. The nursery was a hundred and ten sixty-five.

Q. All right, now, how much did the insurance pay on the doctor's fee? A. Paid half of it, one hundred and sixty dollars.

Q. And how much did they pay for your room at the hospital? A. One hundred and seventy-three forty-eight.

Q. And how much did they pay for the child's room? A. Nothing.

[49] By Mr. Williams: That's all.

By Mr. Wray: I don't believe I have any questions.

By the Court: Step down.

By Mr. Williams: Your Honor, we have the answers to a set of interrogatories, some of which we would like to read into the record. I am afraid I am not familiar with the Court's procedure on this. Would you like us to read the entire question and answer or just state the numbers or file them?

By the Court: How many of them are there that you want to read?

By Mr. Williams: Well, the entire set of interrogatories.

By the Court: No, I mean, the ones you want to read.

By Mr. Williams: About sixty-one.

By the Court: You want to read sixty-one? You want to introduce sixty-one?

By Mr. Williams: Yes, sir.

By the Court: Give the numbers and we will consider them as—file the whole set of interrogatories, and they are now considered—answers to interrogatories, they are now considered a part of the evidence, and it's not necessary, but I usually file them as an exhibit so that they will be properly identified in the record.

By Mr. Williams: I believe a set has already been [50] filed with the Court. They should be in the file.

By the Court: It will now be filed as Exhibit No. . . .

By the Clerk: Plaintiff's Exhibit 7.

By the Court: Seven. So, we won't have to reread them. Now, then, is this the ones that were filed on August the 23rd, '74?

By Mr. Williams: Yes.

By the Court: All right, Plaintiff's Exhibit No. . . .

By Mr. Wray: Your Honor.

By the Court: Yes, sir?

By Mr. Wray: This morning we did file a stipulation as to the exhibits. I want to bring that up, because I think we numbered something else seven in that stipulation, so I believe this will become Exhibit No. 10.

By the Court: Well, I haven't seen the stipulation.

By Mr. Williams: I left it with the girl in your office, Your Honor.

By the Court: You don't file legal documents back in my office, you file them in the Clerk's office.

By Mr. Williams: Well, it was filed with the Clerk's office.

By the Court: And then you brought it back?

By Mr. Williams: Yes, sir.

By the Court: Well, it's not doing us much good. Mr. Marshal, will you go in there and see if you can extract [51] it.

All right, gentlemen, let's be sure you have numbered these exhibits on the schedule of exhibits in the manner in which they were introduced at the last hearing, is that correct?

By Mr. Wray: Numbers one through six which were introduced at the hearing, yes, Your Honor.

By the Court: All right, then, on that basis you have Exhibit No. 7 which is a typewritten note, and was that not introduced the last time?

By Mr. Wray: It was attached to the affidavit of Mr. Hinson which was filed last time.

By the Court: It is now then Exhibit No. 7. All right, then, we had better pull that out and let Mrs. Cross mark it.

By Mr. Wray: It was filed.

By the Court: In the file?

By Mr. Wray: Yes, Your Honor.

By the Court: What is it attached to?

By Mr. Wray: It is attached to the affidavit of Hinson.

By the Court: All right. All right, that will be Exhibit No. 7.

Exhibit 8, has that been filed?

By Mr. Wray: It was attached, Exhibits 8 and 9 were [52] attached to the answers to interrogatories which had been filed, so, it, too—those two should also be in the file.

By the Court: All right, Exhibits 8 and 9 are attached to the interrogatories, and the interrogatories will be filed as Exhibit 10. Very interesting. All right, gentlemen.

By Mr. Williams: The numbers of interrogatories are interrogatories one through seven, twenty-three through thirty-two, thirty-four, thirty-six through forty-five, seventy-five through eighty-four, eighty-eight through ninety-seven, one hundred to one hundred ten, one hundred fourteen to one hundred twenty-three.

By the Court: All right, they are now received in evidence.

Now, you rest, is that right?

By Mr. Williams: Now, we rest.

By the Court: Plaintiff rests.

By Mr. Wray: Defendant rests, Your Honor.

By the Court: All right, I guess we have a nice legal problem then, don't we? You gentlemen have filed briefs. Do you have anything you want to say?

By Mr. Williams: We have it all in the brief that we want to say, Your Honor.

By Mr. Wray: Your Honor, it is in the brief, but I would like to say that at the time we had the hearing on the motion for a preliminary injunction, I believe Your Honor made [53] some indication about the trend of the cases being towards pregnancy having to be treated as. . . .

By the Court: Well, . . .

By Mr. Wray: I think two recent cases, and one is a Supreme Court case decided at the end of June and another. . . .

By the Court: I had that case in mind when I talked about it. Are you talking about the California Blue Cross case—not Blue Cross, but the California. . . .

By Mr. Wray: The State Disability Insurance.

By the Court: Yes, I knew all about that case.

By Mr. Wray: And the subsequent Title VII case relying on that case just says the policy based on pregnancy. . . .

By the Court: I am very familiar with both cases, and the fact I said it was a trend has nothing to do with the way I am going to decide this lawsuit, because I don't know how I am going to decide it myself. I am going to have to do some research, substantial research, and I am aware of a number of—I say a number, I am aware of the trend that's involved, and what have you, and I believe I told the plaintiff that—plaintiff's attorney, that he was in trouble on his group insurance proposition, I thought, because of the California case. Now, at least, I told him I thought he was in trouble in view of a recent decision, and I don't know whether I mentioned the California case or not, but when I came in here, I had digested the California case up [54] one side and down the other, and I knew about the other case. No, I will take that back, I learned about the other case after that, I think. I think it came out a little after the hearing or just right at the time of the hearing.

I don't remember when it was I knew about it, but I knew about it before you referred to it in your brief.

But I get all of those—I take the same books that you take.

I will be happy for you to submit any additional briefs you want within fifteen days, unless you want some additional time, and I want a detailed findings of fact and conclusions of law based on the evidence in the record, and both live and, of course, in auditories, findings of fact, detailed findings of fact and conclusions of law in a manner in which I can just sign my name to them as if you had won. Do you see what I mean? So I can sign my name to them if I decide to do it.

I have been able to sign them maybe twice or three times in the long period of time. Usually neither—as a general rule, I don't see eye to eye with anybody, but once in a while I do, but if you are not aware of the form, you can get a form out of the Clerk's office or get one from my secretary, but most of you have seen my memorandums so you know how I like for them to be.

I have no—if you want to number the [55] paragraphs, you can, but I prefer basically the other, without numbered paragraphs, just a findings of fact and a relation of the facts and conclusions of law with the citations of authority is the way I prefer it, but I have no set rule about it.

Is fifteen days enough?

By Mr. Williams: Yes.

By the Court: Is fifteen days enough for you?

By Mr. Wray: Fifteen days.

By the Court: Then I will start my work after I get those.

All right, Mrs. Cross.

(Thereupon Court Adjourned)

EXHIBIT 1

EMPLOYEE POLICY MANUAL, SICK LEAVE AND PREGNANCY LEAVE SECTIONS

(Filed July 10, 1974)

SICK LEAVE—When an employee is absent because of illness, or non-compensable injury, he will receive pay depending upon his length of service with the company established by the seniority list, according to the following schedule:

Length of Service	Time allowed with Full Pay	Time allowed with One-half Pay
Up to 1 year	1 week	
1 year to 2 years	2 weeks	2 weeks
2 years to 5 years	3 weeks	6 weeks
5 years to 10 years	4 weeks	8 weeks
10 years to 15 years	6 weeks	12 weeks
15 years to 20 years	7 weeks	16 weeks
20 years to 30 years	8 weeks	24 weeks
30 years and over	9 weeks	30 weeks

Any employee who goes one full calendar year (January 1 through December 31) without using any of his sick leave, will be allowed to add 1 week to his full pay sick leave time allowance. This can be accumulated to a total time (including time allowed by the sick leave schedule) of twice the time allowed by the sick leave schedule. Any time used out of this premium sick leave by extended illness may be re-established only by additional year or years without use of sick leave.

Sick leave allowance is for any twelve month period. Length of service to determine the allowance is taken at the beginning of the illness involved. Pay will be computed at straight time rates for the employee's regularly scheduled days of work. When an employee is ill he should notify his supervisor as soon as possible, preferable before starting time. Sick leave will normally commence with the first day of illness, except as follows: An employee with two years service, but less than five years service, shall have a one day waiting period. The waiting period will be waived for an employee with two years service but less than five years service if he is absent for at least five working days for any one period of illness. An em-

ployee with less than two years service shall have a two days waiting period. Waiting period will be waived if the employee is confined in a recognized hospital. In the case of any employee with a record of frequent brief illnesses, a two day waiting period may be imposed. The Department Head or Supervisor may require the employee to furnish a statement from a duly licensed physician, approved by the company physician, attesting to the illness or disability before any sick leave payments are made. Sick leave is not payable for illness caused by an employee's own willful acts. No more than the sick leave allowance for one year can be paid for any one illness. An employee's abuse of the sick leave privilege will be cause for forfeiture of all future rights to paid sick leave.

In case of company on-the-job injury where Workmen's Compensation is to be paid, the difference, if any, between sick leave payments and Workmen's Compensation payments, will be paid. In arriving at any difference between the two, medical and hospital expenses of an employee injured on-the-job will not be included. Only the greater of the two benefits will be paid. Workmen's Compensation benefits will be paid in accordance with the State of Tennessee Workmen's Compensation Law.

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In case of pregnancy, an employee, upon written request, may be granted a leave of absence up to one year. It is considered best that the employee leave the Company at least five months prior to the expected birth. If the employee desires to return to work, the company will make every effort to place her in the first available position for which she is qualified and eligible and acceptable by the Department Head in accordance with the employment policies.

EXHIBIT 2

(Filed July 10, 1974)

NASHVILLE GAS COMPANY

SCHEDULE OF SALARY RATES
EFFECTIVE AUGUST 14, 1972

		Hourly	Weekly
Junior Clerk	Entrance	2.65	106.00
	End 12 Mos.	2.74	109.60
	Standard (24 Mos.)	2.84	113.60
	Maximum	3.10	124.00
Clerk	Entrance	3.27	130.80
	End 12 Mos.	3.34	133.60
	End 24 Mos.	3.43	137.20
	Standard (36 Mos.)	3.52	140.80
	Maximum	3.59	143.60
Senior Clerk	Entrance	3.68	147.20
	End 12 Mos.	3.81	152.40
	Standard (24 Mos.)	3.96	158.40
	Maximum	4.18	167.20
Senior Clerk A	Entrance	3.96	158.40
	End 12 Mos.	4.08	162.20
	Standard (24 Mos.)	4.23	169.20
	Maximum	4.42	176.80
Clerk Stenographer	Entrance	3.35	134.00
	End 12 Mos.	3.46	138.40
	End 24 Mos.	3.54	141.60
	Standard (36 Mos.)	3.64	145.60
	Maximum	3.73	149.20
Jr. Clerk Stenographer	Entrance	2.85	114.00
	End 12 Mos.	3.01	120.40
	Standard (24 Mos.)	3.12	124.80
	Maximum	3.19	127.60
Sr. Clerk Stenographer	Entrance	3.68	147.20
	End 12 Mos.	3.81	152.40
	Standard (24 Mos.)	3.96	158.40
	Maximum	4.18	167.20
Teller	Entrance	3.43	137.20
	End 12 Mos.	3.53	141.20
	Standard (24 Mos.)	3.68	147.20
	Maximum	3.81	152.40

		Hourly	Weekly
Junior Accountant	Entrance	3.68	147.20
	End 12 Mos.	3.81	152.40
	Standard (24 Mos.)	3.96	158.40
	Maximum	4.18	167.20
Senior Accountant	Entrance	4.19	167.60
	End 12 Mos.	4.36	174.40
	Standard (24 Mos.)	4.49	179.60
	Maximum	4.64	185.60
PBX Operator	Entrance	3.68	147.20
	End 12 Mos.	3.81	152.40
	Standard (24 Mos.)	3.96	158.40
	Maximum	4.18	167.20
PBX - Clerk	Entrance	3.35	134.00
	End 12 Mos.	3.46	138.40
	End 24 Mos.	3.54	141.60
	Standard (36 Mos.)	3.64	145.60
	Maximum	3.73	149.20
Billing Machine Operator	Entrance	3.48	139.20
	End 12 Mos.	3.54	141.60
	End 24 Mos.	3.63	145.20
	Standard (36 Mos.)	3.73	149.20
	Maximum	3.81	152.40
Porter	Entrance	2.48	99.20
	End 12 Mos.	2.60	104.00
	Standard (24 Mos.)	2.71	108.40
	Maximum	2.83	113.20
Maid	Entrance	2.48	99.20
	End 12 Mos.	2.52	100.80
	Standard (24 Mos.)	2.57	102.80
	Maximum	2.60	104.00

WCA:mb
8/7/72

EXHIBIT 3

(Filed July 10, 1974)

May 10, 1973

Due to lack of work and job openings I would like the Nashville Gas Company to release me from my leave of absence.

This will let me draw my unemployment until I either find another job or a job opening occurs with the Company.

Nora D. Batty

EXHIBIT 7

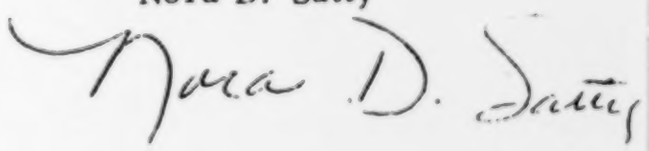
(Filed September 5, 1974)

May 10, 1973

Due to lack of work and job openings, I would like the Nashville Gas Company to release me from my leave of absence, and make my status termination due to reduction in force.

This will let me draw from my unemployment until I either find another job or a job opening occurs with the Company.

Nora D. Satty



No. 75-1083

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORA D. SATTY,
Plaintiff-Appellee,

v.

NASHVILLE GAS COMPANY,
Defendant-Appellant.

AN APPEAL From the United States District Court for the Middle District of Tennessee.

Decided and Filed August 8, 1975.

Before: MILLER and ENGEL,* Circuit Judges, and TAYLOR,** District Judge.

TAYLOR, District Judge. After exhausting her remedies through the Equal Employment Opportunity Commission, this action was initiated by Nora Satty against the Nashville Gas Company for alleged sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The District Court after hearing testimony from plaintiff denied her motion for a temporary injunction but thereafter on November 4, 1974 awarded reinstatement with seniority, back pay, including sick leave, and attorney fees. For the reasons set forth below, we affirm.

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*Judge Engel did not participate in the consideration of this decision.

**The Honorable Robert L. Taylor, United States District Judge for the Eastern District of Tennessee, sitting by designation.

Undisputed, the facts are relatively simple. Plaintiff was initially hired by Nashville Gas as a junior clerk in the customer accounting department on March 24, 1969, and was later promoted to clerk on December 2, 1969. Having previously informed her employer in August 1972 of her pregnancy, she was placed on maternity leave on December 29, 1972, pursuant to the request of the vice-president in charge of personnel. Plaintiff's child was born twenty-five days later on January 23, 1973. Under Nashville Gas' policy, an employee can be granted pregnancy leave for a period of up to one year. Following the child's birth and after a six week checkup the employee is permitted to return to full time status when a permanent position becomes available and when the opening is not bid on by a permanent employee. During the interim between the six week checkup and reemployment on a permanent basis, Nashville Gas attempts to provide the employee with temporary work. As a consequence of this policy, the employee who is placed on pregnancy leave, unlike the male employee who is absent due to a nonwork-related disability, loses her accumulated seniority for job bidding purposes but otherwise retains her accrued vacation and pension seniority. Similarly, while the employee is permitted to apply her accumulated vacation time to her absence during pregnancy, sick leave may not be applied to a pregnancy-related absence. It is these latter two specific policies that are the object of plaintiff's attack.[1]

On March 14, 1973, plaintiff returned to work as a temporary employee and was paid $130.80 per week, as

1. Unlike *Gilbert* v. *General Electric Co.*, No. 74-1557 (4th Cir., June 27, 1975); *Wetzel* v. *Liberty Mutual Insurance Co.*, No. 74-1233 (3rd Cir., Feb. 11, 1975) *cert. granted*, May 27, 1975, 43 U.S.L.W. 3621, and *Communications Workers of America* v. *American Telephone & Telegraph*, No. 74-2191 (2d Cir., Mar. 26, 1975), Nashville Gas has no disability income protection plan for its employees.

opposed to $140.80 she earned prior to her leaving in December, 1972; however, this temporary employment ended on April 13, 1973 when her job was completed. Thereafter, in order to collect unemployment compensation insurance, plaintiff requested Nashville Gas to change her employment status from pregnancy leave to complete termination. It was stipulated by the parties that between December 29, 1972 and May 10, 1973, plaintiff applied for three full-time positions with Nashville Gas which became available; however, in each case a permanent employee with job seniority was awarded the position. Had plaintiff retained her job bidding seniority, she would have been awarded the positions.

Against this background, the principal issue before the Court is whether Nashville Gas' pregnancy policy violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-5, as amended. In holding that defendant's policy is violative of the Civil Rights Act of 1964, we note that this question, as framed in the context of the impact of the Supreme Court's decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), is one of first impression in this Circuit. The same issue has been addressed in four other circuits.[2]

Central to the dispute here is the controlling impact of the Supreme Court's decision in *Aiello* and, more particularly, the weight this Court should attribute to footnote 20 of that opinion. If *Aiello* and footnote 20 are dispositive of the issue whether a distinction between pregnancy related disabilities and other disabilities is sex based, then the threshold issue is easily resolved against plaintiff. If however, *Aiello* is not viewed as dispositive, then the Court must proceed to consider alternative constructions.

2. *Gilbert* v. *General Electric Co.*, *supra*; *Wetzel* v. *Liberty Mutual Insurance Co.*, *supra*; *Communications Workers* v. *American T. & T. Co.*, *supra*; *Holthaus* v. *Compton & Sons, Inc.*, No. 74-1655 (8th Cir. Apr. 10, 1975).

California, in establishing an employee supported disability insurance system for nonwork-related injuries, chose to exclude pregnancy-related disabilities from the scope of the program's operation. Four women who had experienced a period of pregnancy-related disability challenged their exclusion from the program's benefits, and a three-judge district court found such exclusion violated the Equal Protection Clause. However, Justice Stewart speaking for the majority, adopted the "rationally supportable" standard of justification,[3] and held that the state's legitimate interest in seeking to protect the program's financial integrity and self-supporting character allowed it to address "itself to the phase of the problem which seems most acute to the legislative mind . . ."[4] Thus, cast in terms of the administration of a social welfare program, under the Court's interpretation the line drawn by the California legislature was between pregnancy-related disabilities and other disabilities, not between male and female employees. The Court peripherally amplified in footnote 20 its basis for concluding that disability and not sex was the line drawn by California legislature:

> "The dissenting opinion to the contrary, this case is thus a far cry from cases like Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities. While it is true that only women can become pregnant,

3. 417 U.S., at 495.

4. *Id.* (citing *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955)).

> it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed, supra, and Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, *lawmakers are constitutionally free* to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition."
>
> 417 U.S. at 496, n. 20 (emphasis added)

It is apparent from our reading of footnote 20 that the Court's observations are made in the particular and narrow confines of the state's power to draw flexible and pragmatic lines in the social welfare area. To conclude that the Court's footnote is dispositive of an action brought under Title VII would be to ignore the traditional doctrine that the precedential value of a decision should be limited to the four corners of the decisions's factual setting.[5] The reasoning and policy behind this doctrine is readily appreciated when *Aiello* is compared with the facts in this case. Here, the question is whether the exclusion by a private employer of pregnancy-related disabilities from its sick leave and seniority program is a violation of a congressional statute, essentially, a dissimilar question from the issue before the *Aiello* Court — whether a legislative classification dividing disabilities into two classes for the purposes of a disability income protection program finds a rational

5. *Cohens* v. *Virginia*, 6 Wheaton (19 U.S.) 264, 399-400 (1821); *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132-133 (1944); *rehearing denied*, 323 U.S. 818 (1945). *Accord*, *Communications Workers of America* v. *American Telephone & Telegraph Co.*, *supra*, slip opinion, at 2556-57.

basis. It is this very degree of dissimilarity that rejects a blind adherence to footnote 20. To import a different effect to footnote 20 would be to extend the impact of *Aiello* beyond its intended effect. It would appear harsh to read into footnote 20 that the Court expected, in passing on the propriety of a legislative classification under the Equal Protection Clause, to preclude all future discussion of statutory interpretation under a relatively new act such as the Civil Rights Act of 1964. Unless squarely faced with the Act, the Court has evidenced a reluctance to examine its parameters or the interpretive functions of the Equal Employment Opportunity Commission (E.E.O.C.).[6] While mindful of the Court's language in footnote 20, caution dictates that we not make it a talisman for Title VII actions.[7]

E.E.O.C. Guidelines

Turning from *Aiello* for guidance, it is logical that we should look to the agency charged with the administration of Title VII. In this regard, 29 C.F.R. § 1604.10(b) provides:

> "(b) Disabilities cause or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

6. *See Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 640, n. 8, 653 n. 2 (Powell, J., concurring) (1974). In this vein, see also the remarks of Judge Bryan in *Communications Workers* v. *American Tel. & Telegraph Co., supra*, at footnote 11.

7. It is urged that because E.E.O.C. argued in its amicus brief in *Aiello* that the Court's holding would affect similar actions brought under Title VII and that because the Equal Protection issue was decided against the E.E.O.C., the Court intended its holding to extend to Title VII actions. Absent any reference at all to Title VII in *Aiello*, this argument, if adopted, would impermissibly distort the principle of *stare decisis*.

We are urged in this case to reject the lessons of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring), which accord deference to the Commission's interpretation, under the authority of the Supreme Court's recent decision in *Esponoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 96 (1973). There, the Court, rejecting the Commission's regulation that discrimination on the basis of citizenship is tantamount to discrimination on the basis of national origin, noted that the agency had formerly held a different view, but, most importantly, the Court emphasized that "application of the guideline would be inconsistent with an obvious congressional intent . . ."[8] Unlike the situation before the Court in *Espinoza*, we do not have before us any legislative history indicating that the E.E.O.C. interpretation conflicts with the congressional intent. We are not in a position to say that the agency position contravenes the letter or spirit of the Act.[9] Thus,

8. 414 U.S. at 94.

9. It is similarly suggested that E.E.O.C.'s guidelines are in variance with the Wage and Hour Administrator's policy toward pregnancy under the Equal Pay Act, 29 U.S.C. § 206(d); 29 C.F.R. § 800.100, and the Office of Federal Contract Compliance's interpretation of Executive Order 11246, 3 C.F.R. 172, which permits a distinction to be drawn between pregnancy and other disabilities. However, here, we seek to interpret Title VII and not the Equal Pay Act or Executive Order 11246.

absent clear indicia in the form of legislative history that the agency interpretation is unreasonable or unnatural, we must defer to the Commission's construction of the statute as articulated under 29 C.F.R. § 1604.10(b).[10]

We note that in holding that disparate treatment between pregnancy leave and other sick leave constitutes a violation of Title VII, we reaffirm this Court's former decision in *Farkas* v. *Southwestern City School District*, 506 F.2d 1400 (6th Cir. 1974), where the District Court was affirmed and the conclusion reached that exclusion of normal pregnancy from a sick leave program constituted sex discrimination under Title VII. We are not persuaded that that position is incorrect. Though the legislative history of Title VII contains no explicit reference to sex discrimination, we learn from its declaration of policy that its principal aim was to eliminate artificial barriers that fostered disparate treatment, absent a compelling and founded reason for such disparity.

Appellant contends that the test of the validity of an employment policy under Title VII is not different from the test of validity under the Fourteenth Amendment.[11] This argument, however, presupposes that the lawful scope of employment policies under the former Act is coextensive with the latter constitutional provision. We believe that the better approach permits Title VII under the Commerce Clause to extend beyond the reach of the Equal Protection Clause. *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S.

10. *Accord, Gilbert* v. *General Electric Co., supra; Wetzel* v. *Liberty Mutual Insurance Co., supra; Communications Workers of America* v. *American T.&T. Co., supra; Holthaus* v. *Compton, supra; Vineyard* v. *Hollister Elementary School District*, 64 F.R.D. 580 (N.D.Cal. 1974).

11. *Accord, U. S.* v. *Chesterfield County School District*, 484 F.2d 70, 73 (4th Cir. 1973).

294.[12] Otherwise, Title VII's effective reach would be limited by the decisions of the Supreme Court, a result effectively curtailing its implementation.

Relief

The District Court, finding that Nashville Gas' policy violated the provisions of 42 U.S.C. § 2000e-5, ordered that plaintiff recover sick leave benefits that should have been paid during her maternity leave; back wages from March 14, 1973, including any across the board increases, and reduced by temporary wages and unemployment insurance; reinstatement with full seniority and recovery of reasonable attorney fees.

Under the guidelines of *Meadows* v. *Ford Motor Company*, 43 U.S.L.W. 2332 (1975), and *Head* v. *Timken Roller Bearing Company*, 486 F.2d 870 (6th Cir. 1973), we find the District Court's relief appropriate.

The judgment of the District Court is affirmed.

12. *Accord, Communications Workers* v. *American Telephone & Telegraph*, slip opinion at 2562. *See also, Id.* at n. 12. It is submitted that an anomaly would exist if public and private employers were held to different standards under Title VII and the Fourteenth Amendment cases. It would appear, however, that any disparity would have been mitigated by inclusion of "governments" within the meaning of person under the 1972 Amendments. 42 U.S.C. § 2000e.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-536

NASHVILLE GAS COMPANY,
Petitioner,

vs.

NORA D. SATTY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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INDEX

Citations

CASES

UNITED STATES STATUTES

MISCELLANEOUS

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OPINIONS BELOW

The opinion of the District Court (App. 40-55) is reported at 384 F. Supp. 765. The opinion of the Sixth Circuit Court of Appeals (App. 103-110) is reported at 522 F.2d 850.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether an employer's disparate treatment of pregnant employees and those suffering from sickness or injury with regard to sick leave payments constitutes unlawful discrimination on the basis of sex within the prohibition of Title VII of the Civil Rights Act of 1964.

2. Whether an employer's disparate treatment of pregnant employees and those suffering from sickness or injury with regard to retention of accumulated seniority constitutes unlawful discrimination on the basis of sex within the prohibition of Title VII of the Civil Rights Act of 1964.

STATUTE INVOLVED

The relevant provisions of Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a)(1), provide as follows:

> "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ."

STATEMENT OF THE CASE

Respondent, Mrs. Satty, was hired by Petitioner, Nashville Gas Company (herein referred to as the "Company"), as a junior clerk in the customer accounting department on March 24, 1969. She was promoted to clerk on December 2, 1969, the position she held when she was placed on pregnancy leave on December 29, 1972. While she was pregnant, the Company's Vice President of Personnel discussed with her and two other pregnant employees the Company's policy with respect to pregnancy leaves. He stated that any decision as to when pregnancy leave should commence would be based on her doctor's opinion, her duties with the Company, her work area and the degree of public contact, but that he was to have the final decision as to when the leave would commence. Friday, December 22 and Monday, December 25 were company holidays. Mrs. Satty failed to report for work on Tuesday, December 26, Wednesday, December 27, Thursday, December 28 and Friday, December 29, 1972. She was having problems with water retention during such time as a result of her pregnancy. The Company's Vice President of Personnel requested that she request pregnancy leave and pregnancy leave was granted commencing December 29, 1972. Her child was born on January 23, 1973, 25 days after maternity leave commenced (App. 29-30).

The Company does not have a disability plan as such for its employees but does provide a sick leave plan under which it pays employees absent from work due to non-occupational sickness or injury for a specified number of days based on the employee's seniority (App. 96-98). At such time as the employee is able to resume work, he or

she is generally returned to the job previously held if his or her physical condition permits although the Company does not feel that it is obligated to hold jobs open for an employee who is absent for extended periods of time due to nonoccupational sickness or injury (App. 17). Moreover, an employee who returns to work after being on sick leave retains the seniority which he or she has accrued prior to the sickness or injury (App. 18).

Pregnancy is not treated as a sickness or injury under the Company's sick leave plan. Rather a pregnant employee is granted a formal leave of absence by the Company similar to that which is granted to employees, male and female, to pursue additional education or after sick leave has been exhausted. An employee who is placed on formal leave of absence, including pregnancy leave, is paid for accumulated vacation time but does not receive sick leave payments. An employee who has been on formal leave of absence and who desires to return to work is permitted to return to work when a permanent position for which he or she is qualified becomes available and when no employee then permanently employed is bidding on the opening. An employee who has been on a formal leave of absence, including pregnancy leave, and who wants to return to work does not retain previously accumulated seniority for the purpose of bidding on permanent job openings, although he or she is given priority over nonemployees. Upon returning to work such employee does retain previously accumulated seniority for purposes of pensions, vacations and other benefits. During the interim between the time such an employee seeks to return to permanent employment and the time that the employee is re-employed on a permanent basis, the Company attempts to provide the employee with temporary work (App. 17-18, 30-31).

At the time Mrs. Satty was placed on pregnancy leave, the Company was contemplating converting certain of its accounting functions performed in her department to computers and consequently it was determined that Mrs. Satty's position would not be filled. The Company did, however, provide Mrs. Satty temporary work approximately six weeks after her child was born. The temporary employment ended approximately one month later when the job was completed. Thereafter, in order to collect unemployment compensation insurance, Mrs. Satty requested the Company to change her employment status from pregnancy leave to termination, which the Company did (App. 31). During the period between the time Mrs. Satty's child was born and the time she was terminated, she applied for three full-time positions which became available with the Company; however, in each case a permanent female employee with seniority was awarded the position. Had Mrs. Satty retained her job-bidding seniority, she would have been awarded the positions instead of the other females (App. 33).

Between December 29, 1972 (the date Mrs. Satty's pregnancy leave commenced) and July 1, 1974, five employees of the Company were placed on pregnancy leave and two of such employees returned to work as permanent employees. In addition to the three employees who did not return to work as permanent employees, three other permanent clerical employees of the Company resigned between December 1972 and September 1974 when this case came to trial. However, the only new permanent clerical employee or PBX operator (positions of the type for which Mrs. Satty applied) hired by the Company after December 1972, was hired on May 6, 1974 (App. 33-34).

Subsequent to her termination by the Company, Mrs. Satty filed a timely charge of sex discrimination under Title VII of the Civil Rights Act of 1964 with the Equal Employment Opportunity Commission (EEOC). After receiving her "right to sue" letter, she brought an action against the Company in the United States District Court for the Middle District of Tennessee in which the following specific aspects of the Company's employment practices were at issue (App. 35):

1. Payment of pregnancy benefits under the Company's group health and hospitalization insurance plan different from benefits provided under such plan for sickness and accident.

2. The denial of sick leave pay to Mrs. Satty while she was on pregnancy leave.

3. The action of the Company in requiring Mrs. Satty to commence maternity leave on December 29, 1972.

4. The failure of the Company to hold Mrs. Satty's job open for her while she was on maternity leave.

5. The failure of the Company to permit Mrs. Satty to retain her previously accumulated seniority for purposes of bidding on job openings.

Mrs. Satty also alleged that she was terminated by the Company in violation of 42 U.S.C. §2000e-3(a) for complaining about its pregnancy leave policies.

She prayed for reimbursement, back pay, reimbursement for lost sick pay and other fringe benefits, and attorneys' fees (App. 7-8).

Although Mrs. Satty originally sought to maintain this action as a class action, the parties subsequently stipulated

that the number of persons whom she could properly represent was not so numerous that the action could be maintained as a class action under Rule 23, Federal Rules of Civil Procedure (App. 33).

The District Court held that the Company violated Title VII by denying sick leave pay to Mrs. Satty while she was on pregnancy leave since it granted sick leave pay to employees absent due to illness or other non-work related disabilities (App. 45). The District Court also held that although the Company was justified in not holding her job open for her while she was on pregnancy leave (App. 52), its policy of not permitting her to retain her previously accumulated seniority for job-bidding purposes was unlawful discrimination since it permitted employees returning from long periods of absence due to non-job related injuries to retain their seniority (App. 44).

The District Court rejected Mrs. Satty's contentions that payment of pregnancy benefits under the Company's group health and hospitalization plan was discriminatory, that her being placed on pregnancy leave on December 29, 1972 was unreasonable or arbitrary, and that her subsequent termination was retaliatory (App. 43, 52, 54).

Based on stipulations filed by the parties in response to the District Court's opinion, the Court finally ordered (App. 57-58) that Mrs. Satty:

1) recover sick leave benefits that should have been paid during her pregnancy leave in the amount of $732.16;

2) be credited with sick leave benefits from March 14, 1973, the time she returned from maternity leave;

3) be reinstated as a permanent employee as of April 2, 1973, the date that the first permanent position af-

ter March 14, 1973 was filled with another employee whose initial date of hire was later than Mrs. Satty's;

4) recover back pay in the amount of $9,456.21, being back wages from April 2, 1973 reduced by amounts paid for temporary work with the Company, unemployment compensations, and wages from other employment; and

5) recover attorneys' fees in the amount of $3,000.00.

All of such relief was stayed pending appeal.

The Sixth Circuit Court of Appeals affirmed the judgment of the District Court and held that the exclusion of normal pregnancy from a sick leave program and the denial of seniority constituted sex discrimination under Title VII (App. 103-105). The Court of Appeals found this Court's decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), inapplicable to the case at hand, reasoning that the question of whether the exclusion by a private employer of pregnancy-related disabilities from its sick leave and seniority policies is a violation of Title VII is essentially a dissimilar question from the issue in *Geduldig*, i.e., whether a legislative classification dividing disability into two classes for the purposes of a state-supported disability income protection plan violates the Equal Protection Clause of the Fourteenth Amendment (App. 105-108). The Court of Appeals also relied heavily on the current EEOC regulations pertaining to pregnancy-related benefits and deferred to the Commission's construction of Title VII (App. 108-110).

Thereafter, on October 7, 1975, Petitioner, Nashville Gas Company, filed a Petition for a Writ of Certiorari to review the judgment of the Court of Appeals. The Petition was granted on January 25, 1977.

SUMMARY OF ARGUMENT

This case is controlled by *General Electric Co.* v. *Gilbert*, ... U.S. ....., 97 S.Ct. 401 (December 7, 1976), which was decided by this Court after the opinion of the Sixth Circuit Court of Appeals was rendered in this case. In *Gilbert*, this Court held that a private employer could, without violating Title VII of the Civil Rights Act of 1964, exclude pregnancy-related disabilities from coverage under its disability benefits plan absent a showing that such a distinction involving pregnancy was a mere pretext designed to effect an invidious discrimination against the members of one sex or the other. The only employment policies being challenged on appeal in this case are (1) the Company's denial of sick leave benefits to employees on pregnancy leave, and (2) the Company's refusal to credit employees on leaves of absence, including pregnancy leave, with accumulated seniority for job-bidding purposes.

Like the exclusion of pregnancy from coverage under a disability benefits plan, the employment policies at issue in this case do not discriminate on the basis of sex but merely exclude pregnancy coverage from the particular benefit and in all other respects treat women and men equally. Further, there has been no attempt to show that such policies are a mere pretext designed to effect an invidious discrimination against the members of one sex or the other nor has there been any showing that the effect of the Company's sick leave or seniority policies is to discriminate against the members of one sex or another.

The Company has elected to treat pregnancy leave the same as it would any leave of absence and not as a sickness or nonoccupational accident or injury. There is

no rational basis for distinguishing sick leave payments from payments under a disability benefits plan, and this Court has recently recognized this principle when it vacated the judgment of the Ninth Circuit Court of Appeals in *Lake Oswego School District No. 7, et al.* v. *Hutchison*, 519 F.2d 961 (9th Cir. 1975), and remanded the case for proceedings in accordance with *Gilbert*. 45 U.S.L.W. 3462 (No. 75-568, January 10, 1977).

The policy of the Company in refusing to credit those persons on leave of absence, including pregnancy leave, with accumulated seniority for job-bidding purposes does not in itself constitute gender-based discrimination, for there is no risk from which one sex is protected and the other not, nor is there a benefit which one sex receives and which is denied the other sex. The Company established a seniority policy which favored those employees who were actively working for the Company at the time a job opening became available to the detriment of those employees on leave of absence, including pregnancy leave. The benefits of this policy accrue to all continuously employed persons, male and female alike. Furthermore, there is no showing that a denial of seniority for job-bidding purposes is a mere pretext designed to effect invidious discrimination against the members of one sex or the other.

ARGUMENT

I. This Case Is Controlled by the Supreme Court's Holding in General Electric Company v. Gilbert That an Employer's Failure to Cover Pregnancy Related Disabilities Under Its Disability Benefits Plan Does Not Constitute, Per Se, Sex Discrimination in Violation of Title VII of the Civil Rights Act of 1964.

In *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), this Court held that the exclusion of disability attributable to normal pregnancy from coverage under a state disability insurance system was not invidious discrimination violative of the Equal Protection Clause of the Fourteenth Amendment. In so holding, this Court stated:

> "The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such

as this on any reasonable basis, just as with respect to any other physical condition.

"The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes." 417 U.S. at 496, n. 20.

On December 7, 1976, this Court rendered its decision in *General Electric Company* v. *Gilbert*, ... U.S. ....., 97 S.Ct. 401, which involved the question of whether a private employer's disability benefits plan which excludes pregnancy related disabilities from coverage constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964. This Court held that the exclusion of pregnancy from an otherwise comprehensive nonoccupational sickness and accident disability plan is not gender-based discrimination absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other.

The *Gilbert* case involved an employer's disability insurance plan which excluded pregnancy from its coverage but otherwise covered all nonoccupational sicknesses and accidents. In the present case, the following employment practices not present in *Gilbert* were challenged under Title VII:

1) The allegedly arbitrary action of the Company in requiring Mrs. Satty to commence pregnancy leave on the date it did.

2) Payments under the Company's group health and hospitalization plan were allegedly not as generous for pregnancy as they were for other conditions.

3) The failure of the Company to make sick leave payments to Mrs. Satty while she was on pregnancy leave.

4) The failure of Company to hold Mrs. Satty's job open for her while she was on pregnancy leave.

5) The refusal of the Company to credit Mrs. Satty with previously accumulated job seniority for job-bidding purposes when she was able to return to work.

The District Court in this case held that the action of the Company in requiring Mrs. Satty to commence maternity leave on December 29, 1972 was not arbitrary or irrational and did not constitute discrimination (App. 52-53), that the Company was not required to hold her job open for her while she was on leave (App. 52) and that the group health insurance plan which paid 50% of the customary and reasonable fees incurred in connection with pregnancy to female employees or to wives of male employees did not constitute sex discrimination (App. 43). Mrs. Satty did not appeal the determination of the District Court as to these matters and, therefore, these questions are not in issue on this appeal.

The District Court did determine that the Company's policy of denying sick leave pay to pregnant employees on pregnancy leave and its policy of not allowing an employee on pregnancy leave to retain her previously accumulated seniority for purposes of bidding on permanent job openings constituted unlawful sex discrimination. These are the two aspects of the Company's employment policies which are at issue.

In *Gilbert*, this Court noted that Congress had not defined the term "discrimination" anywhere in Title VII but that the similarities between the Congressional language in Title VII and the concepts of discrimination which have evolved from Court decisions construing the Equal Protection Clause of the Fourteenth Amendment indicate that these decisions are a useful starting point in interpreting discrimination under Title VII. This Court stated that its decision in *Geduldig* v. *Aiello, supra,* was certainly relevant in determining whether or not the pregnancy exclusion discriminated on the basis of sex. This Court held that the exclusion of pregnancy from coverage was simply not in itself discrimination based on sex.

It rationally follows from this finding that any personnel policy which excludes pregnancy from coverage but in all other respects treats women and men equal is not in itself discrimination based on sex.

The applicability of this rationale is well illustrated in *Rafford* v. *Randall Eastern Ambulance Service,* 348 F. Supp. 316 (S.D.Fla. 1972), a Title VII case. In *Rafford,* male employees alleged that they were discharged for refusing to remove their beards and mustaches. The Court there held that such refusal was, in fact, the reason for their dismissal, but held that such action was not sex-based discrimination within the scope of Title VII. In addressing the argument of the plaintiffs, the Court said:

> "Plaintiffs in effect argue that males who do not shave cannot work, while females who do not and need not shave are allowed to work. Such an argument has a reductio ad absurdum appeal: since women cannot normally grow beards and mustaches, the firing of men with such features necessarily discriminates against the men because they are men and

> are able to grow beards, i.e., because of their sex. I cannot, however, subscribe to such an interpretation of the Act." 348 F. Supp. at 319.

Having rejected the simplistic concept that any practice based on a sex-related physical characteristic constitutes prima facie sex discrimination in violation of Title VII, the Court articulated the appropriate standard for determining what constitutes such discrimination under Title VII:

> "Virtually all Title VII violations fit an equal protection definition of sex discrimination—dissimilar treatment for similarly situated men and women, where the treatment is based on sex. *Reed* v. *Reed,* 404 U.S. 71 (1971). See, e.g., *Bowe* v. *Colgate Palmolive Company,* 416 F.2d 711 (7th Cir. 1969); *Weeks* v. *Southern Bell Tel. Co.,* 408 F.2d 228 (5th Cir. 1969) (weightlifting requirements); *Sprogis* v. *United Airlines, Inc.,* 444 F.2d 1194 (7th Cir. 1971); *Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542 (1971). Here, however, the Court is presented with a case where there can be no similarly situated members of the opposite sex. An analogy, for which there is some precedent, posits the discharge of a pregnant woman . . . The discharge of a pregnant woman or bearded man does not violate the Civil Rights Act of 1964 simply because only women become pregnant and only men grow beards. In neither instance are similarly situated persons of the opposite sex favored. These cases are perhaps more properly considered under the rubric of *Cooper* v. *Delta Airlines, Inc.,* 274 F. Supp. 781 (E.D.La. 1967), that discrimination between different categories of the same sex is not unlawful discrimination by sex. This is a case of discriminatio

in favor of men who shave off their beards and mustaches. It does not involve proscribed sex discrimination." 348 F. Supp. at 319-20.

Geduldig clearly indicates that the mere fact that an employment policy takes cognizance of a sex-related characteristic does not by itself make it sex discrimination in violation of Title VII. There must also be an element of favoritism toward similarly situated persons of the opposite sex; and that favoritism cannot exist where no member of the opposite sex can be so similarly situated.

This Court in *Geduldig* and *Gilbert* specifically recognized that, absent a showing of pretext, a case of sex discrimination is not established by proof that an employer's personnel policies treat pregnant women differently from women and men who have disabilities due to other causes. The Court recognized in *Geduldig* and *Gilbert* that a finding that there was not sex-based discrimination as such was not the end of the analysis, should it be shown that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other. This Court noted that in neither case was there a showing that the exclusion of pregnancy benefits was a pretext. The Court in *Gilbert* stated:

> "As we noted in that opinion, a distinction which on its face is not sex-related might nonetheless violate the Equal Protection Clause if it were in fact a subterfuge to accomplish a forbidden discrimination. But we have here no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to the members of one race or sex. Pregnancy is of course confined to women, but it is in other ways significantly

> different from the typical covered disease or disability. The District Court found that it is not a 'disease' at all, and is often a voluntarily desired condition. 375 F. Supp. at 375, 377. We do not therefore infer that the exclusion of pregnancy disability benefits from petitioner's plan is a simple pretext for discrimination against women." 45 U.S.L.W. 4034.

There has been absolutely no showing in this case that the treatment afforded pregnant female employees under the personnel policies in question was motivated by any intent to discriminate against female employees nor can such an inference be drawn.

This Court did acknowledge in *Gilbert* that a Title VII violation could be established under certain circumstances upon proof that the effect of an otherwise facially neutral plan or classification is to discriminate against members of one class or another. However, in the present case, there has been no proof of any such discriminatory effect and, as recognized by this Court in *Gilbert*, the burden of proving such effect is on the plaintiff.

> "Respondents, who seek to establish discrimination, have the traditional civil litigation burden of establishing that the acts they complain of constituted discrimination in violation of Title VII. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975); *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973)." 45 U.S.L.W. 4034, n. 14.

In the present case both the District Court and the Court of Appeals held that the rationale of the *Geduldig* case was not applicable (App. 45, 107). In addition the Court of Appeals, in finding unlawful sex discrimination, relied heavily (App. 108) on the guidelines of the Equal Employment Opportunity Commission promulgated in 1972

which stated that disabilities caused or contributed to by pregnancy and related conditions should be treated on the same terms and conditions as are other temporary disabilities, 29 C.F.R. §1604.9(b) and §1604.10(b).

In *Gilbert*, this Court explicitly rejected the concept that the reasoning of *Geduldig* was not applicable to an action under Title VII. Furthermore, this Court, in *Gilbert*, specifically rejected the EEOC guideline for the reasons that it was not a contemporaneous interpretation of Title VII since it was first promulgated eight years after the enactment of that Title and that the 1972 guideline flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute. This Court stated:

> "We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency. *United Housing Foundation* v. *Forman*, 421 U.S. 837, 858-9, n. 25 (1975); *Espionosa* v. *Farah Manufacturing Co.*, . . . 414 U.S. at 92-96. In short, while we do not wholly discount the weight to be given the 1972 guideline, it does not receive high marks when judged by the standards enunciated in *Skidmore* [323 U.S. 130 (1955)]." 45 U.S.L.W. 4036.

That the opinion of the Court of Appeals in this case has no continuing validity after the decision of this Court in *Gilbert* was explicitly recognized by Mr. Justice Brennan in his dissent in that case. 45 U.S.L.W. 4037.

Not only is there no basis in the opinion in the *Gilbert* case for distinguishing the present case, but as Petitioner will hereafter show, the employment policies at issue in this case fit squarely within the rationale of the *Gilbert* case.

II. Petitioner's Denial of Sick Leave Benefits to Respondent While She Was on Pregnancy Leave Does Not Constitute Sex Discrimination in Violation of Title VII of the Civil Rights Act of 1964.

Both this case and the *Gilbert* case involve the employer's policy for providing periodic payments to employees who are absent from work as a result of a non-job related sickness or accident. In the *Gilbert* case, the plan is referred to as a disability plan and is administered for the employer by an insurance company (although the employer is for all practical purposes a self-insurer). In the present case, the policy plan is referred to as sick leave. In both cases the payments under the disability plan are based on an employee's regular weekly earnings. In the *Gilbert* case, payments continued (after a specified waiting period) up to a maximum of 26 weeks for any one continuous period of disability or successive periods of disability due to the same or related causes. In the present case, the period of time for which payments are made in a twelve-month period depend on the employee's length of service with the Petitioner and the extent to which the employee has previously been on sick leave (App. 96-98). Neither plan provides any payments in the event of absence due to pregnancy.

Notwithstanding the different names applied to the two policies and the slightly different methods for determining benefits, the two policies are essentially the same and there is no rational basis for distinguishing the two plans under the opinion of this Court in the *Gilbert* case.

This Court stated in *Gilbert*:

> "As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect

in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive.[17] For all that appears, pregnancy related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially even-handed inclusion of risk. To hold otherwise would endanger the common sense notion that an employer who has no disability benefits program at all does not violate Title VII even though the 'underinclusion' of risk impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon the other." 45 U.S.L.W. 4035.

This Court went on to state in footnote 17 to the *Gilbert* opinion:

> "Absent proof of different values, the cost to 'insure' against the risk is, in essence, nothing more than extra compensation to the employees in the form of fringe benefits. If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the 'insurance', there would clearly be no gender based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the 'extra' disabilities due to pregnancy. While respondent seemed to acknowledge that the failure to provide any benefit at all would not constitute sex-based discrimination in violation of Title VII, see note 18, infra, they illogically also suggest that the present scheme does violate Title VII because. . . ." 45 U.S.L.W. 4035, n. 17.

The rationale set forth above applies with equal force to Petitioner's sick leave plan. The cost to Petitioner of its sick leave plan is the amount it pays employees who are absent from work due to sickness or injury.

Common sense dictates that the payment for sick days in circumstances not previously paid for by the Petitioner would cost the Petitioner additional money. Any increase in the number of sick days used would certainly increase the cost to the Petitioner. To hold that pregnancy related disabilities must be included under the sick leave policy would obviously increase the number of disabilities for which sick days would be paid under the plan since they have not heretofore been included.

The only way cost could remain the same between a paid sick day plan covering pregnancy and one which did not cover pregnancy would be to reduce the amount of sick days or the amount of the daily benefit under the policy to reflect additional days used under the policy for pregnancy. Such a reduction of benefits to maintain a constant cost to the employer would mean that pregnant women would receive a benefit at the expense of those male and female employees who are disabled for reasons unrelated to pregnancy. Title VII does not require an employer to reduce benefits to non-pregnant persons in order to benefit pregnant persons.

Furthermore, this Court has held that employers have no obligation under Title VII to pay additional benefits to pregnant employees. *Gilbert, supra,* 97 S.Ct. at 409, 410, n. 17. However, even if the amount of daily benefit

is not reduced, the inclusion of pregnancy under the sick leave plan would create an additional benefit for pregnant women in the amount of days used for pregnancy that would not have been otherwise used.

Under *Gilbert*, if the Petitioner increased each employee's wages by the average amount of cost incurred under the paid sick days plan, excluding pregnancy, and removed the paid sick days fringe benefit, there would be no violation of Title VII. This would be true even though a female employee who wished to purchase sick leave coverage for all disabilities, including pregnancy, would have to pay more than employees (both male and female) not wishing pregnancy coverage but merely paid sick leave coverage with the same daily benefits, due to the fact that the female's premiums would reflect the extra cost of pregnancy. As in *Gilbert*, the ultimate result here would be that a woman who wished to be fully insured would have to pay any incremental amount over other employees due solely to the possibility of pregnancy related disabilities. Like the employer in *Gilbert*, Petitioner has no obligation under Title VII to pay that incremental amount.

As in *Gilbert*, there is absolutely no showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of the female sex. There is absolutely no evidence in the record that the selection of the risks covered by the Petitioner's sick leave policies work to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the policy. There is absolutely no risk from which men are protected and women are not. Likewise, there is absolutely no risk from which women are protected and men are not. Respondent made no effort to make such a showing,

and it is submitted that Respondent could not. Respondent, as in *Gilbert*, has not attempted to meet the burden of demonstrating a gender-based discriminatory effect resulting from the exclusion of pregnancy related disabilities. Since there is no proof in the record that Petitioner's sick leave plan is in fact worth more to men than women, it is impossible to find any gender-based discriminatory effect in this policy simply because women disabled as a result of pregnancy do not receive benefits.

That a sick leave plan such as Petitioner's does not, under the opinion of this Court in *Gilbert*, constitute unlawful sex discrimination was apparently recognized when this Court vacated the judgment of the Ninth Circuit Court of Appeals in *Lake Oswego School District No. 7, et al.* v. *Hutchison*, 519 F.2d 961 (1975) and remanded the case for proceedings in accordance with *Gilbert* 45 U.S.L.W. 3462 (No. 75-568, January 10, 1977).

III. Petitioner's Policy of Not Crediting Employees on Leave of Absence, Including Pregnancy Leave, With Accumulated Seniority for Job-Bidding Purposes Does Not Constitute Sex Discrimination in Violation of Title VII of the Civil Rights Act of 1964.

Not only did the District Court and the Court of Appeals find that Petitioner violated Title VII by denying sick leave payments to Respondent but both courts also found that Petitioner violated Title VII by not giving Respondent credit for her previously accumulated seniority when she bid on job openings that were available when she was able to return to work. Petitioner submits that such policy does not constitute discrimination on the basis of sex any more than does the denial of pregnancy benefits under the disability insurance plar.

The holdings of this Court in both *Gilbert* and *Geduldig* indicate that the fact that pregnancy is treated differently from other conditions or situations by an employer does not in itself constitute gender-based discrimination. To apply the language of *Geduldig* by analogy, and viewing the risk as the loss of accumulated seniority, "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." 417 U.S. at 496-497.

Inasmuch as *Gilbert* clearly stands for the proposition that disparate treatment of pregnancy by an employer is not in itself sex discrimination, it then only remains to determine whether such treatment is a mere pretext designed to effect an invidious discrimination against the members of one sex or whether the effect of such treatment is to discriminate against members of one sex.

It is significant to note in the present case that pregnancy is not the only condition or situation which under the policy of the Petitioner results in a loss of accumulated seniority for job-bidding purposes. Employees on leave of absence for educational reasons do not retain accumulated seniority for job-bidding purposes (App. 30-31). Similarly, an employee who is absent from work due to injury or illness may be placed on formal leave of absence by Petitioner in which case the employee does not retain seniority for job-bidding purposes when he returns to work (App. 18). Thus, unlike the *Gilbert* case, in which apparently only females (i.e., those who were pregnant) were denied benefits under the disability plan, what evidence there is in the record in the present cases indicates that both males and females are, under certain circumstances, denied credit for accumulated seniority for job-bidding purposes.

There is certainly no showing in this case that Petitioner's policy with respect to accumulated seniority is a pretext for discrimination against females. In fact, the record in this case indicates that the Petitioner permits an employee returning from pregnancy leave, as it would permit any other employee returning from a formal leave of absence, to retain seniority for purposes of vacation and pension (App. 30). It is also the policy of the Petitioner to give an employee on pregnancy leave temporary work for which she is qualified when such temporary work is available (App. 30) and in fact Respondent was given such temporary work in this case (App. 31). Furthermore, while an employee returning from pregnancy leave does not retain accumulated seniority for job-bidding purposes, Petitioner's policy would, in awarding jobs favor such employee over an applicant who had not been previously employed by Petitioner (App. 30).

Moreover, the fact that Petitioner's policy with respect to accumulated seniority treats pregnancy differently from heart attacks or back trouble (to use examples cited in the Interrogatories included in the record) does not carry with it any suggestion of an intent to discriminate against females because this Court itself acknowledged in *Gilbert* that pregnancy is significantly different from the typical disease or disability and, as recognized by the District Court in the *Gilbert* case, it is not a "disease" at all and is often a voluntarily undertaken and desired condition. Or as stated by this Court in *Geduldig*, "pregnancy is an objectively identifiable physical condition with unique characteristics." Thus an employer's disparate treatment of pregnancy does not carry with it any indication that it is a pretext for invidious discrimination and there is no evidence in the record that Petitioner had the intent or purpose of discriminating against women.

There is no requirement that the Petitioner recognize seniority for any purpose. Its policy merely favors those employees who are actively working for the company at the time a job opening becomes available to the detriment of those employees on leave of absence, including maternity leave. The benefits of this policy accrue to all continuously employed persons, male and female alike. In fact, in its application to Respondent, the policy had the effect of granting jobs on which she was bidding to other females (App. 33).

Petitioner's policy with respect to accumulated seniority is analogous to the disability plan that was approved by this Court in *Gilbert*. In *Gilbert*, it was recognized that an employer could without violating Title VII fail to provide any disability benefits. Similarly, Petitioner could without violating Title VII provide that any absence from work would result in loss of accumulated seniority for the purpose of bidding on subsequent job openings. In *Gilbert*, the employer determined to pay disability benefits for all non-occupational sickness and accidents except pregnancy and such plan was approved by this Court. In this case, Petitioner has determined to permit the retention of accumulated seniority in cases of sick leave but has determined not to extend such policy to certain other forms of leave such as pregnancy leave, education leave or formal leave of absence after sick leave has been exhausted. If an employer has no obligation to permit absences from work without loss of seniority, it follows that in permitting certain absences without loss of seniority, it is not required to permit all absences to be without loss of seniority. To paraphrase the statement of this Court in *Gilbert*: For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to provide them with retained seniority

in the case of this risk does not destroy the presumed parity of the benefits accruing to men and women alike, which results from the facially evenhanded *inclusion* of absences permitted without loss of seniority.

Furthermore, as in *Gilbert*, the Respondent has introduced no evidence that Petitioner's policy with respect to accumulated seniority has the effect of providing more benefits for males than for females. To do so presumably Respondent would have to show that relative to their proportion of the work force, males are permitted more days of absence from work without loss of accumulated seniority than are females. The record contains no such evidence whatsoever.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed and the case dismissed.

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March, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-536

NASHVILLE GAS COMPANY,
Petitioner,

vs.

NORA D. SATTY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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INDEX

Citations

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OPINIONS BELOW

The opinion of the District Court (App. 40-55) is reported at 384 F. Supp. 765. The opinion of the Sixth Circuit Court of Appeals (App. 103-110) is reported at 522 F.2d 850.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) (1974), in pertinent part provides:

> Section 703. (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . .

QUESTIONS PRESENTED

1. Whether an employer's disparate treatment of employees returning to employment from pregnancy and those returning to employment from sickness or injury with regard to retention of accumulated seniority constitutes unlawful discrimination on the basis of sex within the meaning of Title VII of the Civil Rights Act of 1964.
2. Whether an employer's disparate treatment of pregnant employees and those suffering from sickness or injury with regard to sick leave payments, when used as a mere pretext, constitutes unlawful discrimination on the basis of sex within the prohibition of Title VII of the Civil Rights Act of 1964.

STATEMENT OF THE CASE

Respondent, Nora Satty, was hired by the petitioner, Nashville Gas Company (hereinafter referred to as the "Company"), as a junior clerk in the customer accounting department on March 24, 1969 and was promoted to Clerk on December 22, 1969. She continued to hold that position until December 29, 1972, when she was placed on pregnancy leave. (App. 29).

In August, 1972, Mrs. Satty learned that she was pregnant. This pregnancy was not planned, but was accidental. As soon as Mrs. Satty learned that she was pregnant she told the Company. (App. 61). At some point after informing the Company that she was pregnant, the Company's Vice-President of Personnel discussed with Mrs. Satty and two other pregnant employees the Company's policy with respect to pregnancy leaves. At that time the Company representative told Mrs. Satty and the other two pregnant employees that a decision as to when they should commence pregnancy leave would be based on their doctor's opinion, their duties with the company, their work area, and degree of public contact, but that the Company was to have the final decision as to when pregnancy leave was to commence. (App. 29). At some time prior to being placed on pregnancy leave, Mrs. Satty informed the Company that she wished to return to work after the birth of her child. (App. 64).

Friday, December 22, and Monday, December 25, were Company holidays. After plaintiff failed to report for work on December 26, December 27, December 28, and December 29, Mrs. Satty's supervisor requested her to request pregnancy leave and pregnancy leave was granted, commencing December 29, 1972. Her child was born on January 23, 1973, twenty-five (25) days after pregnancy leave commenced. (App. 30).

The Company does not have a disability plan as such. Employees absent from work due to non-occupational sickness or injury are granted paid sick leave for a specified number of days based on the employee's seniority. (App. 96-98). Employees who go on pregnancy leave are not paid any accumulated sick leave, but are paid for any accumulated vacation time. (App. 32).

At such time as an employee on sick leave is ready to return to work, he or she is generally returned to the job previously held if his or her physical condition permits. Although the Company does not feel that it is obligated to hold jobs open for an employee who is absent for extended periods of time with non job-related illness or injury, it has in practice usually held such job open. (App. 17). Employees returning from long periods of absence due to non job-related injuries do not lose their seniority and in fact their seniority continues to accumulate while absent. (App. 45).

It is the policy of the Company to permit employees on pregnancy leave to return to permanent employment when there is an available position for which such employee is qualified and for which no person permanently employed is bidding. Prior to such permanent employment becoming available it is the policy of the Company to give the employee on pregnancy leave temporary work for which she is qualified when such temporary work is available. An employee who has been on pregnancy leave and returns to permanent employment retains the seniority she had previously accumulated for purposes of pension, vacation, etc., but does not retain such seniority for the purpose of bidding on job openings. (App. 10).

Pregnant women are placed on leave of absence according to the Employment Policy Manual of the Company. (App. 98). The affidavit of the Vice-President of Personnel of the Company (App. 10) and the Stipulations of Fact drawn by the parties refer to this leave as "pregnancy leave." (App. 30). Pregnancy leave is limited to one year at the maximum. (App. 10, 30). The Company has another status known as "leave of absence" which employees may request. Two employees have requested and been granted leave of absence in the eleven (11) years preceding the trial of this case. Neither has returned to the Company. (App. 10-11). If an employee were granted such a leave of absence and later returned to the Company, that employee would not have any previously accumulated seniority for job-bidding purposes. (App. 31).

Mrs. Satty returned to work for the Company as a part-time employee on March 14, 1973. Prior to being placed on pregnancy leave, Mrs. Satty earned $140.80 per week. Upon returning as a part-time employee, the plaintiff earned $130.80 per week. (App. 11). Mrs. Satty applied for three (3) full-time jobs while working as a part-time employee. Under the Company policy, permanent employees who applied for the job were given preference over Mrs. Satty because they were determined to have more seniority. (App. 11). If Mrs. Satty had been credited with the seniority she accumulated prior to being placed on pregnancy leave, she would have been awarded any of the positions for which she applied. (App. 33). Mrs. Satty's part-time employment ceased on April 13, 1973, the project on which she was working having been completed. (App. 31).

Subsequent to her termination by the Company, Mrs. Satty filed a timely charge of sex discrimination under Title VII of the Civil Rights Act of 1964 with the Equal Employment Opportunity Commission (EEOC). After receiving her "right to sue" letter, she brought an action against the Company in the United States District Court

for the Middle District of Tennessee in which the following specific aspects of the Company's employment practices were at issue (App. 35):

> 1. Payment of pregnancy benefits under the Company's group health and hospitalization insurance plan different from benefits provided under such plan for sickness and accident.
>
> 2. The denial of sick leave pay to Mrs. Satty while she was on pregnancy leave.
>
> 3. The action of the Company in requiring Mrs. Satty to commence pregnancy leave on December 29, 1972.
>
> 4. The failure of the Company to hold Mrs. Satty's job open for her while she was on pregnancy leave.
>
> 5. The failure of the Company to permit Mrs. Satty to retain her previously accumulated seniority for purposes of bidding on job openings.

Mrs. Satty also alleged that she was terminated by the Company in violation of 42 U.S.C. §2000e-3(a) for complaining about its pregnancy leave policies.

She prayed for reimbursement, back pay, reimbursement for lost sick pav and other fringe benefits, and attorneys' fees. (App. 7-8).

Mrs. Satty originally sought to maintain this action as a class action. The parties subsequently stipulated that the number of persons whom she could properly represent was not so numerous that the action could be maintained as a class action under Rule 23, Federal Rules of Civil Procedure. (App. 33).

The District Court held that the Company violated Title VII by denying sick leave pay to Mrs. Satty while she was on pregnancy leave. (App. 45). The District Court

also held that the Company's policy of not permitting Mrs. Satty to retain her previously accumulated seniority for job-bidding purposes was unlawful discrimination. (App. 44).

Based on stipulations filed by the parties in response to the District Court's opinion, the Court finally ordered (App. 57-58) that Mrs. Satty:

> (1) recover sick leave benefits that should have been paid during her pregnancy leave in the amount of $732.16;
>
> (2) be credited with sick leave benefits from March 14, 1973, the time she returned from pregnancy leave;
>
> (3) be reinstated as a permanent employee as of April 2, 1973, the date that the first permanent position after March 14, 1973 was filled with another employee whose initial date of hire was later than Mrs. Satty's;
>
> (4) recover back pay in the amount of $9,456.21, being back wages from April 2, 1973 reduced by amounts paid for temporary work with the Company, unemployment compensation, and wages from other employment; and
>
> (5) recover attorneys' fee in the amount of $3,000.00.

All of such relief was stayed pending appeal.

The Sixth Circuit Court of Appeals affirmed the judgment of the District Court and held that the exclusion of normal pregnancy from a sick leave program and the denial of seniority constituted sex discrimination under Title VII. (App. 103-111).

Thereafter, on October 7, 1975, petitioner, Nashville Gas Company, filed a Petition for a Writ of Certiorari to review the judgment of the Court of Appeals. The Petition was granted on January 25, 1977.

SUMMARY OF ARGUMENT

This case is not controlled by this Court's decision in *General Electric Co.* v. *Gilbert*, ... U.S. ....., 97 S.Ct. 401 (December 7, 1976). This Court in *Gilbert* was faced with the rather narrow issue of whether disabilities arising or connected with pregnancy could be excluded from an employer's Sickness and Accident Insurance Plan without violating Title VII. While respondent agrees that petitioner's sick leave plan is for all intents and purposes the same as the plan examined in *Gilbert*, respondent submits that because the exclusion of sick pay is only one of the many ways in which female employees who experience pregnancy are treated differently by petitioner, the holding in *Gilbert* is not controlling.

While *Gilbert* involved the mere under-inclusiveness of a Sickness and Accident Insurance Plan, this case involves a denial of sick pay, failure to hold employment positions open, and a denial of job-bidding seniority. While in *Gilbert* the denial of Sickness and Accident disability benefits was the total extent to which pregnant employees were treated differently, the denial of sick pay by petitioner is only the initial stage of disparate treatment afforded employees who experience pregnancy. While *Gilbert* dealt with disparate treatment during pregnancy and recovery therefrom, this case involves continuing disparate treatment of female employees long after pregnancy itself is all but a memory.

This Court in *Gilbert* recognized that pregnancy is significantly different from typical illnesses and injuries. Therefore, this Court held that disparate treatment of pregnancy by an employer is not in itself sex discrimination and the fact that pregnancy is treated differently from other conditions or situations by an employer does not

itself constitute gender-based discrimination. But, while the disparate treatment of pregnancy may be permissible, the disparate treatment of women who have experienced pregnancy and return, or attempt to return, to employment is impermissible. Petitioner's denial of job-bidding seniority to women returning from pregnancy leave cannot have any rational relationship to pregnancy. In the context of the denial of job-bidding seniority to these women, pregnancy is not the subject of treatment, disparate or otherwise. The denial of accumulated job-bidding seniority does not occur until the female employee attempts to return from pregnancy leave, and therefore, at the time accumulated job-bidding seniority becomes an issue, pregnancy no longer exists. While *Gilbert* involved certain compensation benefits which were not extended to employees, this case involves a situation in which the employee is deprived of something she already has, that is seniority.

This Court recognized in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) and reiterated in *Gilbert*, that a finding that there is not sex-based discrimination as such is not dispositive of a case alleging a violation of Title VII. Distinctions involving pregnancy are utilized by petitioner as mere pretexts to accomplish a forbidden purpose. Distinctions involving pregnancy are used as a justification for disparate treatment of women long after pregnancy is completely finished and are mere pretexts designed to effect an invidious discrimination against women who have, or who are likely to have, pre-school age children during their employment by petitioner.

This is not a case of an employment policy which merely takes cognizance of a sex-related characteristic but is void of an element of favoritism, as in *Gilbert*, but is rather an employment policy which takes cognizance of a sex-related characteristic and does involve an element of favoritism.

ARGUMENT

I. This Case Is Not Controlled by the Supreme Court's Holding in General Electric Company v. Gilbert.

Petitioner asserts that this case is controlled by this Court's decision in *General Electric Co.* v. *Gilbert*, ... U.S. ....., 97 S.Ct. 401 (December 7, 1976). In *Gilbert* this Court examined a challenge under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.* (1974), of the policy of General Electric Company of excluding disabilities arising from pregnancy under its Weekly Sickness and Accident Insurance Plan. This Court in *Gilbert* was faced with the rather narrow issue of whether disabilities arising or connected with pregnancy could be excluded from an employer's Sickness and Accident Insurance Plan without violating Title VII. Respondent agrees that petitioner's Sick Leave benefit plan is, in and of itself, for all intents and purposes, the same as the Weekly Sickness and Accident Insurance Plan examined in *Gilbert*. Respondent further agrees that if the exclusion of sick pay was the only manner in which respondent had been treated differently by petitioner, *Gilbert* would control.

Respondent submits that because the exclusion of sick pay is only one of the many ways in which female employees who experience pregnancy are treated differently by petitioner, the holding in *Gilbert* is not controlling. Upon examination of the overall manner in which female employees who experience pregnancy are treated by petitioner, it becomes plain that petitioner's policies are much more pervasive than the mere under-inclusiveness of the Sickness and Accident Insurance Plan in *Gilbert*.

Once an employee of Nashville Gas Company becomes pregnant, and informs the company, a process of classification and segregation is initiated which pervades her actual pregnancy and recovery, and continues for the remainder of her employment by the company. Pregnant employees are confronted with a separate leave policy established and maintained by petitioner. Petitioner maintains various types of leave policies which are utilized by employees absent from their employment due to any reason other than job related illness or accident. When an employee is absent because of a non-job related illness, or non-compensable injury, he or she is placed on "sick leave" and receives pay depending upon his or her length of service with petitioner. There is no limitation placed on the amount of time an employee may remain on "sick leave", although said sick leave stops at some pre-determined point. An employee who desires to absent himself from employment for reasons other than illness or non-compensable injury, may request a "leave of absence" upon having just cause for a reasonable specified length of time. Women employees who become pregnant during their employment with petitioner are required to take what is described in the Employment Manual as a "leave of absence". Although petitioner's written policy in regard to such leave is couched in terms of "leave of absence" the policy as stated in the affidavit of Elmer Henson and the answers to Interrogatories is stated in terms of "pregnancy leave". Although petitioner asserts that "pregnancy leave" is equivalent in all respects to "leave of absence", it is submitted that petitioner maintains three (3) types of leave: "sick leave", "leave of absence", and "pregnancy leave". Although petitioner's "Employee Policy Manual" presents the availability of "pregnancy leave" in permissive terms, to wit:

> In case of pregnancy, an employee, upon written request may be granted a leave of absence. . . . (App. 98),

the District Court found that "actual practice demonstrates that a pregnant employee may not decline to accept 'pregnancy leave', and still retain employee affiliation with the defendant company." (App. 98). A pregnant employee may remain in that status for up to one year. Although there is no statement of policy concerning the status of an employee on "leave of absence" due to pregnancy who is unable to return to work after one year, the District Court found that "a fair inference is that such employee would be terminated." (App. 43).

Had respondent and other pregnant employees been merely denied sick pay, and all disparate treatment ended at that point, *Gilbert* would clearly control. While in *Gilbert* the denial of Sickness and Accident disability benefits was the total extent to which pregnant employees were treated differently, the denial of sick pay by petitioner is only the initial stage of disparate treatment afforded employees who experience pregnancy. In fact, when viewed in the context of the total effect of petitioner's policies on such persons' employment, the denial of sick pay to pregnant employees is of minor consequence and effect.

Once an employee is placed on "pregnancy leave" status by petitioner, the ramifications of such status continue well past pregnancy and recovery therefrom, and continue for the remainder of such woman's employment, while the effects of "sick leave" status end completely upon the employee's recovery from the cause of his or her absence from employment.

Employees, other than supervisors, who are absent from work for extended periods of time due to non-job related injuries or illnesses (i.e. on "sick leave") are generally returned to the position they held previous to their absence, if his or her physical condition permits. (App. 17). Such employees return to their previous position at the same classification rate, are entitled to any pay raises that may have taken effect during their absence (App. 17), are entitled to the seniority which he or she had earned prior to their absence (App. 17), and, in fact, the District Court found that their seniority continues to accumulate during their absence from employment. (App. 45). Further, as appears in at least one instance, even if an employee is unable to perform the duties of the position he or she held prior to being on "sick leave", such person is placed in another permanent position which he or she is able to perform. (App. 19).

The treatment afforded employees who have been on "pregnancy leave" and who return to employment, or, more accurately, attempt to return to employment, is dramatically different. "Pregnancy leave" is limited to one year, while there is no such arbitrary limit placed upon the time allowed for "sick leave" or "leave of absence". A woman returning from "pregnancy leave" is not (as is an employee returning from "sick leave") returned to the position previously held if her physical condition permits, nor, is such employee even assured a return to permanent employment in any position. Rather, it is petitioner's policy to permit employees returning from "pregnancy leave" to return to permanent employment when there is an available position for which such employee is qualified and for which no person permanently employed by petitioner is bidding. (App. 10).

The District Court found there was a legitimate basis for petitioner's decision not to hold respondent's job open in the Accounting Department. Petitioner was considering prior to respondent's pregnancy, and had initiated, the transfer of certain accounting functions to its Computer Processing Department and had undertaken to discontinue its merchandise business. (App. 52). While this finding has not and is not questioned by respondent, it is amply clear that pursuant to petitioner's stated policies this job would not have been held for respondent had there been no legitimate basis for such a failure.

Although employees returning from "sick leave" are returned at their same classification rate and are entitled to any pay raises which may have occurred during their absence, employees returning from "pregnancy leave" are not granted permanent employment status, except under the conditions noted above, but are offered temporary work, if such temporary work is available, until permanent employment becomes available. While in such temporary employment, employees returning from "pregnancy leave" are not paid at the same rate of compensation which they received prior to their commencing "pregnancy leave", but are paid at the rate of compensation which other temporary employees receive who are initially commencing employment with petitioner. Respondent, prior to her commencing "pregnancy leave", was employed in the position of Clerk and was earning the weekly wage of One hundred, forty dollars, eighty cents ($140.80) (App. 11), which is the weekly rate for a Clerk having at least thirty-six (36) months of seniority. (App. 99). Upon her return from "pregnancy leave", having experienced a normal pregnancy, respondent was afforded temporary employment by petitioner from March 14, 1973 to April 13, 1973, at which time such temporary employment ceased. During

such temporary employment, respondent performed the duties of Clerk and received the weekly wage of One hundred, thirty dollars, eighty cents ($130.80), which is the entrance wage for the Clerk's position. (App. 99).

Employees returning from "pregnancy leave", unlike employees returning from "sick leave" do not retain full seniority privileges which had accrued prior to their absence and which accumulate during their absence. An employee who has been on "pregnancy leave" and is allowed to return to permanent employment status, retains the seniority she had previously accumulated for purposes of pension, vacation, etc., but does not retain such seniority for the purposes of bidding on job openings. (App. 10). Respondent was not afforded permanent employment status upon her return but did return to employment in a temporary capacity and while in such capacity did bid on three (3) job openings with petitioner. Had respondent been permitted to retain her job-bidding seniority accumulated prior to the commencement of her "pregnancy leave", she would have had more seniority than each of the other three applicants. (App. 33). The positions were awarded to other employees who were credited with greater job-bidding seniority even though respondent had the earlier date of initial employment. (App. 44). The District Court found that seniority is the primary factor in the job-bidding process and that the failure to credit respondent with seniority for this purpose was the sole reason she failed to gain a permanent position with petitioner following her return from "pregnancy leave". (App. 44).

Petitioner asserts that pregnant employees who are placed on "pregnancy leave" have the same status and limitations as persons who take a "leave of absence". Only two (2) employees (male) have been granted a "leave of absence". One male employee was granted a year's

"leave of absence" to complete work for a college degree, but he did not seek to return to work at the end of his "leave of absence". At the time of trial in the District Court, another male employee was on "leave" to complete his education. (App. 10-11). Apparently these two employees are the only employees who have taken a "leave of absence" for any reason other than pregnancy. Petitioner's Executive Vice-President for Personnel, by affidavit, stated that if the employee who was on "leave" and if any other employee, male or female, were granted a "leave of absence" for reasons other than pregnancy, such employee would be afforded the same treatment as that given to female employees on "pregnancy leave". (App. 11).

While petitioner asserts that the policies are the same for all employees, male or female, returning from "leave" status, it must be recognized, as did the District Court, that pregnant women are required to take "pregnancy leave". In all cases other than pregnancy, the decision to take "leave of absence" is entirely a voluntary matter with each employee. (App. 44). It is only in the case of pregnancy that an employee is denied the opportunity to take "sick leave". (App. 44). It is submitted that petitioner actually maintains three (3) leave policies, to wit: "sick leave" (entitled to all benefits), "leave of absence" (denied certain benefits but entirely voluntary and apparently unlimited as to duration), and "pregnancy leave" (denied certain benefits, entirely involuntary and limited to one year's duration).

For the above described reasons, it is submitted that this case is clearly not controlled by the holding in *Gilbert*. While *Gilbert* dealt with disparate treatment of pregnancy in one area (i.e. disability benefits) and while this case involves disparate treatment of pregnancy in the same area, it also involves disparate treatment of a class of women long after pregnancy is all but a memory.

II. Petitioner's Policy of Not Crediting Employees Returning From Pregnancy Leave With Accumulated Seniority for Job-Bidding Purposes Constitutes Sex Discrimination in Violation of Title VII.

Petitioner contends that the holding in *Gilbert* should also control the decision in this case as to the denial of accumulated seniority for job-bidding purposes. While *Gilbert* did sanction the disparate treatment of pregnancy in the limited context of disability payments during pregnancy, such decision is not controlling as to the denial of accumulated seniority in this cause.

While *Gilbert* dealt with treatment of pregnancy, petitioner's denial of accumulated job-bidding seniority has no actual connection with pregnancy. The denial of accumulated seniority does not occur until such time as the employee is physically able to return to employment following either the birth of a child and the recovery therefrom, or the termination of the pregnancy by other means, and the recovery therefrom. Therefore, at the time accumulated job-bidding seniority becomes an issue, pregnancy no longer exists.

While *Gilbert* involved certain compensation benefits which were not extended, this case does not involve a denial of a benefit, but involves a situation in which the employee is deprived of something she already has, that is, seniority. This Court has rendered decisions which speak of the value and importance of seniority.

For example, in the case of *Humphrey* v. *Moore*, 375 U.S. 335, 346-347 (1964), this Court stated:

> Seniority has become of overriding importance and one of its major functions is to determine who gets or who keeps an available job.

Of course, as previously stated, that is precisely the case here. Seniority determined who was to get the jobs. Respondent was stripped of her previously accumulated job-bidding seniority and did not qualify for jobs to which she would have been entitled.

Seniority has been found to be of such "vast and increasing importance" that in the case of *Franks* v. *Bowman*, ... U.S. ....., 96 S.Ct. 1251 at 1265 (March 24, 1976), this Court has given sanction to remedial systems which create retroactive seniority, that is seniority from the time someone should have been employed, rather than when they were actually employed. Surely if persons are entitled to seniority for time they were not actually working, respondent is entitled to job-bidding seniority for the three years she did work.

In regard to petitioner's policy of denying job-bidding seniority to women who have been on "pregnancy leave" the only connection such policy has to pregnancy is that women who attempt to return from "pregnancy leave" have been pregnant and normally have at least one preschool age child that they did not previously have. While a pregnant woman is significantly different from a woman or a man who has some other type of non-job related illness or injury, a woman who attempts to return to employment from "pregnancy leave" is not significantly or, in fact, any different from a man or a woman who returns from a non-job related illness or injury. In both instances they are employees who have previously recovered from the cause of their absence from employment and are ready, willing, and able to return to employment.

Pregnancy as the cause of former absence from employment is, of course, confined to women. At the time of the scrutiny, that is, at the time such person is ready to return to work, it is in no way significantly different

from other causes of absence from employment. At that point, the cause of the former absence is irrelevant. Although the cause of former absence from employment could be relevant if it is one which has been demonstrated to likely recur, since it could affect the employee's ability to properly perform his duties in the future, there is absolutely no evidence that such a neutral criteria was used by petitioner to determine who is entitled to re-employment. Should such neutral criteria be utilized, it would appear that women returning from "pregnancy leave" would have no difficulty meeting such criteria since their cause of absence, pregnancy, is admittedly completely finished, while conditions such as back sprains, which seem to be a common non-pregnancy cause of absence from petitioner's employment, are likely to recur because of the weakened condition of such employees.

In *Gilbert*, this Court was presented with a case where there could be no similarly situated members of the opposite sex, due to the fact that men cannot become pregnant and due to the significant difference of pregnancy from the typical covered disease. Therefore, there was no showing of an opportunity for dissimilar treatment for similarly situated men and women. But in this case, there are similarly situated members of each sex. Men who return to employment following an absence from employment due to a non-job related illness or injury are similarly situated, and in fact are exactly situated, as women who return to employment following an absence from employment due to pregnancy. Men who return from absence from employment are favored by being allowed to retain all seniority rights to the detriment of similarly situated women who return from absence from employment due to pregnancy and are stripped of their job-bidding seniority. Thus, this is not a case of an employment policy

which merely takes cognizance of a sex-related characteristic but is void of an element of favoritism, as in *Gilbert*, but it is rather an employment policy which takes cognizance of a sex-related characteristic and does involve an element of favoritism.

Respondent is in complete agreement with petitioner's assertion that *Gilbert* stands for the proposition that disparate treatment of *pregnancy* (emphasis added) by an employer is not in itself sex discrimination and the fact that *pregnancy* (emphasis added) is treated differently from other conditions or situations by an employer does not itself constitute gender-based discrimination. But, in the context of petitioner's denial of job-bidding seniority, pregnancy is not the subject of treatment, disparate or otherwise. At the time the job is bid on, pregnancy no longer exists. For, at the time any employee returns or attempts to return to permanent employment the cause of their former absence, whether due to pregnancy or conditions such as heart attacks, is no longer present and the employee is physically able to return to employment.

Petitioner asserts that its policy merely favors those employees who are actively working for the company at the time a job opening becomes available. It is obvious that an employee who is on "sick leave" due to a heart attack or other non-compensable disability is no more "actively working for the company" than is a woman who is on "pregnancy leave". A woman who returns to employment following her recovery from childbirth is no less "actively working for the company" than another employee who returns following a heart attack. While prior to return to permanent employment, there are differences in the cause of absence, the effect (absence) is the same. Once an employee returns to permanent employment from any type of leave they are "actively working for the company". To apply petitioner's language, the petitioner's policy favors men who are "actively working for the company" to the detriment of women who are also "actively working for the company". Further, it is at precisely this point in time, when both classes of employees are again "actively working for the company", that petitioner's favoritism toward similarly situated persons of one sex is apparent.

The denial of seniority rights for job-bidding purposes is obviously one of the evils Congress intended to remove by the passage of Title VII. As stated in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 at 431 (1971):

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

It is submitted that the denial of job-bidding seniority to women returning from "pregnancy leave" is an artificial, arbitrary and completely unnecessary barrier to employment which operates to invidiously discriminate on the basis of sex.

Of course, it cannot be said that the petitioner's policy of denying accumulated seniority for job-bidding purposes actually affects all women employees. Nor, taking the petitioner's stated intentions as to the treatment of employees returning from "leave of absence" at face value, can it be said that this policy is applied only to women, but it is not necessary to show that a policy affects all women and only women for there to be a Title VII violation.

This Court has recognized that the effect of Sec. 703 (a) of Title VII is not to be diluted because only a subclass of a protected class is singled out for differential

treatment. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544 (1971), *Rev'g* 411 F.2d 1 (5th Cir. 1969). This Court held:

> Sec. 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading the section as permitting one hiring policy for women and another for men—each having pre-school age children. 400 U.S. 542.

It is submitted that merely because petitioner's denial of job-bidding seniority does not actually affect all women employees, but a sub-class thereof, does not dictate a finding that the policy is not promulgated and applied because of such individual's sex.

Although petitioner's stated intention to treat men and non-pregnant women who return from a "leave of absence" the same as women who return from "pregnancy leave", would seem to be facially neutral, the discriminatory effect of this policy upon women is apparent.

It is submitted that the record in this case supplies an ample basis for a finding of discriminatory effect. This Court has recognized that the "Act" proscribes "not only overt discrimination, but also practices that are fair in form, but discriminatory in operation". *Griggs, supra* at 431-432.

The petitioner's job-bidding seniority policy would, under the rationale of both *Gilbert* and *Geduldig* v. *Aiello*, 417 U.S. 484, seem to be facially non-discriminatory in the sense that "there is no risk from which men are protected and women are not and there is no risk from which women are protected and men are not". *Id.* at 496-497. But while it may arguably be facially neutral, petitioner's

policy is discriminatory in operation and effect. In both *Gilbert* and *Geduldig*, this Court recognized that only women were affected by the benefit policy, but found no discriminatory effect because of the unique quality of pregnancy and its attendant cost. In *Gilbert, supra*, at 409-410, this Court noted:

> for all that appears, pregnancy-related disabilities constitute an additional risk, unique to women. This Court recognized that if the employer were to remove the insurance fringe benefits, a woman would have to pay more than a male who purchased identical disability insurance, due to the fact that her insurance had to cover the "extra" disability due to pregnancy.

This Court pointed out that it would cost both parties, an employer with sick leave and an employee with private insurance, an incremental amount and that Title VII's proscription on discrimination does not require, in either case, the employer to pay that incremental amount. Therefore, this Court found a rational basis for such a policy and the fact that it affected women more than men did not render the policy unlawful.

Cost cannot possibly be a factor in petitioner's policy of denying job-bidding seniority to women returning to employment. There is no expense to the employer whatsoever for allowing any employee to retain seniority for job-bidding purposes once he or she has returned to permanent employment. There is no cost to the employer, either incremental or otherwise, for allowing a woman to retain job-bidding seniority upon her return to permanent employment following pregnancy. Nor, can there be any other rational basis for the denial of job-bidding seniority. Therefore, it is submitted that the greater impact upon women employees without a rational basis, dic-

tates a finding of discriminatory effect and a violation of Title VII.

While in *Gilbert*, the increased cost of providing pregnancy benefits provided the business necessity for the policy of excluding pregnancy from the benefit program, petitioner's policy of denying job-bidding seniority has no basis in any sort of business necessity. In fact, it would appear that such a policy creates, rather than avoids, a detriment to the company. By pursuing this policy, petitioner deprives itself of the opportunity to fill job positions with the most experienced employee out of the universe of persons applying for such positions.

Petitioner's policy excludes women from employment on the basis of a sweeping disqualification. All women with any past record of pregnancy while employed by petitioner, regardless of their qualifications, are stripped of job-bidding seniority.

While petitioner's policy of denying accumulated seniority for job-bidding purposes to employees who have been on "pregnancy leave" is stated to apply to all other persons who take "leave of absence", such policy has never been applied to persons on "leave of absence" for reasons other than pregnancy. The only evidence to substantiate the existence of such a policy is found in the company's stated intentions to apply this policy to employees on "leave of absence" for non-pregnancy reasons, which intentions were stated following respondent's challenge of petitioner's employment policies. Assuming that the stated intentions were in fact petitioner's policy, it does not follow that the denial of accumulated seniority to employees on "leave of absence" for non-pregnancy reasons eliminates the sex discrimination of denying accumulated seniority to employees returning from "pregnancy leave". In all cases other than pregnancy, the decision to take a "leave of

absence" is entirely a voluntary matter with each employee. It is only in the case of pregnancy that an employee is denied the opportunity to take "sick leave" and is forced to take "pregnancy leave". (App. 44).

Therefore, assuming that all other non-pregnant employees who take a "leave of absence" are denied accumulated seniority upon their return, it is apparent that, for whatever reason, they have voluntarily chosen to forfeit their rights to accumulated seniority for job-bidding purposes in exchange for the opportunity to take a "leave of absence" from their employment. Employees who become pregnant, either voluntarily or accidentally, do not choose to forfeit their seniority rights, but rather, are forced to do so by taking "pregnancy leave". Thus, petitioner's policy classifies and segregates employees who become pregnant without any element of choice on the part of such employee and without any rational basis or compelling business necessity. This policy of classifying and segregating employees violates §703(a)(2) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2 (a) (1974), which in pertinent part provides:

> Sec. 703. (a) It shall be an unlawful employment practice for an employer—
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise, adversely affect his status as an employee, because of such individual's . . . sex . . .

The denial of accumulated seniority for job-bidding purposes obviously deprives or tends to deprive women who have experienced pregnancy of employment opportunities. The denial of seniority prevents such employees

from becoming re-employed by the petitioner, with all the attendant increases in responsibility and compensation, which they would be entitled to, but for the denial of accumulated seniority. The extent of such deprivation of employment opportunities is vividly illustrated in the present case. Respondent bid on three (3) positions and was denied employment in all three positions. The failure to credit respondent with seniority for this purpose was the sole reason she failed to gain the positions. (App. 44). Had respondent been credited with seniority for job-bidding purposes, she would have acquired permanent employment status on March 14, 1973 in the position of PBX Operator at an increased salary from her former salary of One hundred, forty dollars, eighty cents ($140.80) (App. 11), to a salary of One hundred, forty-seven dollars, twenty cents ($147.20) (App. 100) and would have had different responsibilities and, presumably, increased responsibilities.

Nor, can it be doubted that such policy adversely affects the employees' status. Respondent, as all other women who return from "pregnancy leave", was unable to obtain the positions for which she otherwise would have been entitled and was prevented from acquiring the status of a permanent employee due solely to the denial of accumulated seniority for job-bidding purposes.

Section 703(a)(2) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) (1974) in pertinent part provides:

> Section 703(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .

Nor, can it be disputed that the denial of seniority for job-bidding purposes amounts to a refusal to hire an individual. Petitioner failed and refused to hire respondent for the three (3) positions for which she applied. This refusal was based on the denial of the accumulated seniority for job-bidding purposes. Likewise, petitioner's policy dictates a refusal to hire any woman for all permanent positions, save those which are vacant and for which no current employee is bidding, who return from "pregnancy leave" solely on the basis of the denial of seniority for job-bidding purposes. Clearly, this policy also affects the privileges of employment for all women who attempt to return to employment following "pregnancy leave".

III. The Supreme Court's Holding in General Electric Company v. Gilbert Does Not Endorse Exclusion of Sick Leave Benefits for Pregnant Employees in a Situation in Which Distinctions Involving Pregnancy Are Mere Pretexts Designed to Effect an Invidious Discrimination Against the Members of One Sex.

This Court recognized in *Geduldig*, and reiterated in *Gilbert*, that finding that there is not sex-based discrimination *per se* is not dispositive of a case alleging a violation of Title VII. This Court recognized in *Gilbert*, *supra* at 404 that should it be shown: ". . . that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other . . .", the analysis of a policy must continue. It is submitted that distinctions involving pregnancy, which standing alone have been sanctioned by *Gilbert*, as used by petitioner are mere pretexts and a subterfuge to accomplish a forbidden purpose.

This Court has recognized in *Phillips, supra,* that §703(a) of the Civil Rights Act of 1964 does not permit one hiring policy for women and another for men—each having pre-school age children. Although, apparently, the District Court did not address the issue and thus did not make a finding as to whether distinctions involving pregnancy were mere pretexts, there is ample proof in this record to support a finding that petitioner attempts to accomplish a forbidden discrimination of maintaining one employment policy for women and another for men—each having pre-school age children. The only meaningful distinction between petitioner's employment policies and that of Martin Marietta in *Phillips* is that petitioner's policies are directed to current employees while the policies in *Phillips* were directed to initial applicants for employment.

Petitioner maintains a policy of placing persons who experience pregnancy on "pregnancy leave" upon their absence from employment which causes attendant loss of sick pay privileges which are enjoyed by other employees who become absent from employment due to non-pregnancy causes. This differential treatment would, standing alone, be justified by distinctions involving pregnancy. But, petitioner's utilization of these distinctions as a subterfuge becomes apparent when the treatment of employees is examined following their return or attempt to return to employment.

While employees returning or attempting to return to employment from "pregnancy leave" are treated dramatically different from employees who return from "sick leave", the only distinguishing factor is that women who are on "pregnancy leave" can be expected and do normally have a pre-school age child during the term of their employment by petitioner. It is submitted that petitioner's policy which treats ditferently employees who have re-

turned from "sick leave" and who are actively working for the company from women who have returned from "pregnancy leave" and who are also actively working for the company, is unlawful discrimination. The only possible identifiable basis for such a distinction is the fact that a woman who returns to employment from pregnancy leave then has a pre-school age child. It is submitted that this type of discrimination is forbidden and petitioner's use of distinctions involving pregnancy is a subterfuge to accomplish this forbidden discrimination.

It is apparent that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against women who have, or who are likely to have, pre-school age children during their employment by petitioner. Distinctions involving pregnancy are used as a justification for disparate treatment of women long after pregnancy is completely finished. Because of petitioner's use of distinctions involving pregnancy as mere pretexts and as a subterfuge for a forbidden discrimination, petitioner's denial of sick leave benefits to pregnant women should not be allowed.

Distinctions involving pregnancy are not utilized by petitioner in a rational determination to exclude pregnancy from its sick leave plan, as in *Gilbert,* but are utilized as a subterfuge to accomplish a forbidden discrimination.

Petitioner's policy of stripping women who return from "pregnancy leave" of the majority of their former employment privileges has a chilling effect on such women's desire and ability to remain in the employ of petitioner. While petitioner does not openly rid itself of women with pre-school age children, the effect of petitioner's policies is to create artificial, arbitrary, and unnecessary barriers to employment which operate to invidiously discriminate

against women who have pre-school age children. While the means utilized by petitioner are not as drastic and patent as the firing of such employees would be, respondent's request for complete termination to enable her to receive unemployment compensation is a graphic example of the similarity in effect. Thus, petitioner's exclusion of a sex-linked disability (i.e., pregnancy) from the universe of compensable disabilities was not the product of neutral-persuasive actuarial considerations, but rather stemmed from a policy of utilizing a pregnancy-centered differentiation as a mere pretext designed to effect an invidious discrimination against the members of one sex.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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April, 1977

FOR ARGUMENT

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-536

NASHVILLE GAS COMPANY,
Petitioner,

vs.

NORA D. SATTY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INDEX

Table of Authorities

OTHER AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-536

NASHVILLE GAS COMPANY,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. A Decision in Favor of Petitioner Would Not Require This Court to Adopt an "Anything Goes" Approach to Pregnancy Policies Since Petitioner's Policies Are Rationally Justifiable and Do Not Warrant an Inference That Such Policies Are a Pretext for Discrimination Against Female Employees.

The Amicus Brief of American Civil Liberties Union and Women's Legal Defense Fund (pp. 8, 29) suggests that Petitioner is inviting this Court to adopt an "anything goes" approach to personnel policies regarding pregnancy. Adoption of an "anything goes" approach is not necessary

in order to find that Petitioner's policy does not violate Title VII.

Petitioner is not unmindful that this Court in *General Electric Co.* v. *Gilbert*, ... U.S. ....., 50 L.Ed.2d 343 (1976), recognized that a personnel policy which treats pregnancy differently from other disabilities may constitute a violation of Title VII if a plaintiff can show that such a difference in treatment is motivated by an invidious intent on the part of the employer to favor male employees over female employees or that the effect of such a policy is to favor male over female employees. Thus this Court has already indicated that personnel policies regarding pregnancy may constitute a violation of Title VII.

In the instant case there is no evidence with respect to the effect of Petitioner's seniority policies on male employees as a group as compared to female employees as a group. Rather the real thrust of the Respondent's Brief and the Amicus Briefs supporting Respondent seems to be that *Gilbert* can be distinguished from the present case on the ground that the additional cost to General Electric of including pregnancy under its disability plan provided a rational basis for the policy at issue in that case while no such monetary justification is present with respect to the seniority policy at issue in this case. Apparently, this Court is to infer from the absence of such monetary justification that Petitioner's policy is simply a pretext seized upon by Petitioner to discriminate against females. Such an inference however, is even less justified here than it would have been in *Gilbert*.

A seniority policy is, as recognized in the Amicus Brief of the American Federation of Labor and Congress of Industrial Organizations and International Union, UAW (pp. 12-13), designed to foster continuity of employment

and orderly career development and thus justifies rewarding persons who do not absent themselves for reasons of personal preference or to pursue another activity. Under such a system an employer may rationally favor those employees who do not absent themselves for education, travel or other reasons of personal preference over those who do so absent themselves. Such absences are disruptive and need not be encouraged by the employer.

On the other hand, an employer may rationally decide to permit absences resulting from heart attack, back trouble or automobile accident (to cite the *only* examples reflected in the record in this case) without loss of seniority. The rationale for permitting such absences is that such conditions are unfortunate and unintended occurrences which should not give rise to more favored treatment for employees not subjected to such misfortunes. Absence due to heart attack, back trouble or automobile accident does not reflect an exaltation of the employee's personal preference over the business interest of the employer.

In the context of such classification, it is not irrational for an employer to treat pregnancy as a matter of personal preference, more similar in terms of employee outlook and motivation to educational or other personal leave, than to heart attack, back trouble or automobile accident. Such a view of pregnancy and its status in the context of a seniority policy is no different from that adopted by a majority of this Court in *Gilbert*, wherein the Court stated as follows:

> "Pregnancy is of course confined to women, but it is in other ways significantly different from the typical covered disease or disability. The District Court found that it is not a 'disease' at all, and is often a voluntarily undertaken and desired condition 375 F. Supp. at 375, 377. We do not therefore infer that the exclusion

of pregnancy disability benefits from petitioner's plan is a simple pretext for discriminating against women." 50 L.Ed.2d at 354.

The fact that a particular pregnancy may not be voluntarily undertaken or a desired condition does not render the employer's policy irrational, because in the majority of cases, pregnancy is such a condition. Furthermore, as Mr. Justice Brennan acknowledged in *Gilbert*, any attempt by an employer to differentiate between voluntary and involuntary conceptions would be "obnoxious" and "intrusive". 50 L.Ed.2d at 363, n. 3.

It is the employer's attitude about the nature of pregnancy rather than any attitude about women which explains Petitioner's treatment of pregnancy under its seniority policy.

To the extent that the opposing briefs in this case would seek to distinguish *Gilbert* on the basis of the cost justification present in that case, they would apparently have this Court believe that the attitude toward pregnancy described above played no part in General Electric's decision not to provide disability benefits for pregnancy. Assuming General Electric determined not to pay for a completely comprehensive disability plan, it would strain common sense to believe that it was mere chance that pregnancy rather than some other disability was not included. That the failure to include pregnancy under the plan was not mere chance does not render the policy unlawful under Title VII. The policy is still facially neutral since it pertains to a category with respect to which there are no comparable males. Furthermore, the policy is not an invidious pretext since it simply reflects the inherently different nature of pregnancy from sickness and accident. The General Electric plan is based on the same attitude which prompts Petitioner not to include pregnancy among

the causes of absence which will be permitted without loss of seniority for job-bidding purposes. If Petitioner had refused to grant accumulated vacation time to employees going on pregnancy leave, it would have a cost justification for its disparate treatment of pregnancy in such regard. That the presence of such justification would provide more protection against an inference of pretext than would the rationale underlying Petitioner's seniority policy is absurd. Petitioner in this case is seeking to encourage employees to stay on the job rather than simply to save money.

Petitioner's attitude toward pregnancy and its treatment under the seniority system would not necessarily support every policy with respect to pregnancy, such as automatic firing of a pregnant employee, for example. To the extent that the employee who has gone on pregnancy leave (or other personal leave) has experience which is valuable to Petitioner, he or she is treated more favorably than the person who has never been employed by Petitioner or the person who has completely terminated his relationship with Petitioner. Not only is such employee permitted to retain seniority for vacation and pension purposes, but, more significantly in the context of the rationale of a seniority system for job-bidding purposes, he or she is offered temporary work when available and is given preference over non-employees for permanent positions. In this way Petitioner does furnish the employee with an incentive to return to work. However, such favoritism is not extended at the expense of those employees who could not, or did not, become pregnant or take personal leave.

For the reasons set out above, any inference that Petitioner's policy is mere pretext for discrimination would be unwarranted.

II. This Court's Holding in *Gilbert* Is Pertinent to the Allegation of a Violation of Section 703(a)(2) of Title VII of the Civil Rights Act of 1964.

The Amicus Brief of the American Federation of Labor and Congress of Industrial Organizations and the International Union, UAW seeks to limit the applicability of the *Gilbert* decision to violations of Section 703(a)(1) of Title VII (pp. 24-26). Petitioner acknowledges that *Gilbert* was decided under Section 703(a)(1); however, the language therein construed is clearly pertinent to Section 703(a)(2) as well. It is not the difference in the terminology of the two sections, but rather their similarity which is of significance in viewing the instant case in light of the *Gilbert* decision. The proscriptions of both Section 703(a)(1) and Section 703(a)(2) are against employer practices vis-a-vis an employee ". . . because of such individual's . . . sex. . . ." *Gilbert* establishes that treatment because of pregnancy is not on the basis of sex; rather it is on the basis of a sex-related physical characteristic. It follows that although a given practice may fall within Section 703(a)(1) as being a discriminatory action and another practice may be covered by Section 703(a)(2) as a classification affecting employee status or opportunity, neither is unlawful unless it is based on sex or some other prohibited basis. Because the Petitioner's policies are based upon pregnancy, they clearly do not deprive an individual of employment opportunities or affect employee status *because of sex*.

The AFofL Brief also suggests that Respondent has established a violation of Section 703(a)(2) merely by showing that Petitioner's employment policies have a disparate impact upon pregnant women. Petitioner admits that in some circumstances a prima facie case can be established under Section 703(a)(2) without proof of the

employer's discriminatory intent. In such instances, however, the consequences of the employer action must be "invidiously to discriminate on the basis of racial or other impermissible classification," *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971). The record in the instant case fails to show that the impact of the questioned policies and practices affects a protected class. The only group which is in fact affected is that of pregnant employees.

For the above reasons, the *Gilbert* decision is determinative of both the Section 703(a)(1) and the Section 703(a)(2) aspects of this case.

III. The Reasons Which Prompted This Court to Reject the EEOC Guideline in *Gilbert* Apply With Equal Force in This Case.

The Amicus Brief of the American Civil Liberties Union and Women's Legal Defense Fund argues that the EEOC sex discrimination guideline is entitled to deference on the issues involved in this case since, in contrast to *Gilbert*, the standards set forth in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) were met, to-wit:

1) the interpretation is consistent with the EEOC's earlier pronouncements; and

2) no position in conflict with EEOC's has been taken by any other federal authority concerned with the implementation of legislation proscribing sex discrimination.

This Court found in *Gilbert* that the EEOC guideline in question was not a contemporaneous interpretation of Title VII since it was promulgated eight years after the passage of the Act. This Court further found that the 1972 guideline flatly contradicted earlier pronouncements of the EEOC made closer to the enactment of the governing statute. 50 L.Ed.2d at 358.

The 1972 guideline contradicts earlier pronouncements of the EEOC, not only in the area of disability benefits, but with respect to sick leave and seniority also. The opinion letter by the General Counsel of EEOC, dated October 17, 1966, quoted in *Gilbert,* states:

> "You have requested our opinion whether the above exclusion of pregnancy and childbirth as a disability under the long-term salary continuation plan would be in violation of Title VII of the Civil Rights Act of 1964.
>
> In a recent opinion letter regarding pregnancy, we have stated, 'the Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees.'. . ." CCH Employment Practices Guide, ¶ 17,304.43.

In another opinion letter, dated November 15, 1966, the Commission's policy was stated as follows:

> "The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex . . . accordingly, we believe that to provide substantial equality of employment opportunity . . . there must be special recognition for absences due to pregnancy, . . . for this reason, . . . a leave of absence should be granted for pregnancy whether or not it is granted for illness." Decision No. 70-360, CCH EEOC Decisions, ¶ 6084 (December 16, 1969).

The above EEOC decision points out in a footnote that "leave of absence" means the permitted absence of an employee on *non-pay* status during which time his job is guaranteed or held until his return or until some specified period. Neither in 1966 nor in 1969 did the Commission attempt to compare an employer's treatment of illness or injury with its treatment of maternity because the EEOC clearly took the position that maternity was a temporary disability unique to the female sex.

When the EEOC did issue formal guidelines on pregnancy in 1972, eight years after the enactment of Title VII, it adopted a position diametrically opposed to its prior position. The gist of the 1972 guideline, and of Respondent's position in this case, is that pregnancy should for all purposes be handled in the same manner as sickness or accident. The prior EEOC position was just the opposite, namely that pregnancy need not be so treated. Furthermore, it is clear from the 1969 EEOC decision quoted above that the Commission's prior position with respect to pregnancy was not limited to the salary continuation aspects of an employer's policy.

Furthermore, it was not until 1971 that the EEOC took the position that employment policies other than the termination of an employee on account of pregnancy violated Title VII. The Director, Legislation Counsel Division of the Office of the General Counsel of the EEOC in 1971 evidently took the position that an employer must offer the employee a leave of absence with the right of reinstatement to the position vacated, at no loss of seniority or any of the other benefits and privileges of employment. *See,* Fuentes, *Federal Remedial Sanctions: Focus on Title VII,* 5 VALPARAISO U. L. Rev. 374, 390-391 (1971). She apparently recognized that there may be situations where it was not possible to keep the employee's job open or

filled on a temporary basis, so that the employer would be justified in replacing her. In this situation, the employer should try to place her in an equivalent position upon her return to work. She recognized that this may not be possible and that the employer may be justified in (1) offering her a temporary job in a lower classification until such time as she can be restored to her original job, (2) offering her a permanent position in a lower job classification, or (3) providing her with preferential consideration for future openings, in that order of priority. *Id.* at 391 n. 85. This is precisely what Petitioner attempted to do for Respondent.

Not only is the general approach of the 1972 EEOC pregnancy guideline inconsistent with the prior EEOC position but such guideline is inconsistent with the regulations promulgated by the Office of Federal Contract Compliance Programs. These guidelines issued by the OFCC were published at 35 F.R. 8888, June 9, 1970. They provide in pertinent parts:

> "(g)(1) Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. For example, if the female employee meets the equally applied minimum length of service requirements for leave time she must be granted a reasonable leave on account of childbearing. The conditions applicable to her leave (other than the length thereof) and to her return to employment, shall be in accordance with the employer's leave policy.

> (2) If the employer has no leave policy, childbearing must be considered by the employer to be a justification for a leave of absence for a female employee for a reasonable length of time. Following childbirth, and upon signifying her intent to return within a reasonable time, such female employee shall be reinstated to her original job or to a position of like status and pay, without loss of service credits." 41 CFR 60-20.3 (1970).

Like the earlier EEOC decisions, these regulations call for special provisions for pregnancy leave. That these regulations differ substantially from the 1972 EEOC guideline was explicitly acknowledged by the Department of Health, Education and Welfare in issuing its Higher Education Guidelines pursuant to Executive Order 11246. BNA Affirmative Action Compliance Manual for Federal Contractors 400:212.

Thus, the present EEOC guideline should fare no better in its application to Petitioner's seniority policies than it did in its application to General Electric's disability plan.

Respectfully submitted,

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September, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-536

NASHVILLE GAS COMPANY,

Petitioner,

—v.—

NORA D. SATTY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE* OF AMERICAN CIVIL LIBERTIES UNION AND WOMEN'S LEGAL DEFENSE FUND

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INDEX

TABLE OF AUTHORITIES

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-536

NASHVILLE GAS COMPANY,

Petitioner,

v.

NORA D. SATTY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICI CURIAE

Interest of Amici [1]

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that confinement of women's

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1 This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

opportunities is a pervasive problem at all levels of society, public and private, the American Civil Liberties Union has established a Women's Rights Project to work towards the elimination of gender-based discrimination. The American Civil Liberties Union believes that this case, concerning the Title VII rights of work force members disabled due to pregnancy, poses an issue of great significance to the achievement of full equality between the sexes.

The American Civil Liberties Union has participated in a number of cases involving government and employer rules subjecting women who bear children to disadvantageous treatment. The Union acted as amicus curiae in Cohen v. Chesterfield County School Board and Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), which declared inconsistent with due process forced termination of a teacher's employment at a fixed stage of pregnancy, in Geduldig v. Aiello, 417 U.S. 484 (1974), which upheld, against an equal protection challenge, the exclusion of women disabled by childbirth from a state-operated social insurance program, and in Wetzel v. Liberty Mutual Insurance Co., 511 F. 2d 199 (3d Cir. 1975), vacated on juris. grounds, 424 U.S. 737 (1976), and General Electric Co. v. Gilbert, 97 S. Ct. 401 (1976), both concerning the Title VII rights of working women disabled by pregnancy. Lawyers for the American Civil Liberties Union were counsel for the petitioners in Struck v. Secretary of Defense, 461 F. 2d

1372 (9th Cir. 1971, 1972), cert. granted, 409 U.S. 947, judgment vacated and case remanded for consideration of mootness, 409 U.S. 1071 (1972), which challenged the attempt by the Air Force to discharge Captain Struck for pregnancy, and Turner v. Department of Employment Security, 423 U.S. 44 (1975), which held inconsistent with due process a state law declaring pregnant women ineligible for unemployment compensation from twelve weeks before until six weeks after childbirth.

With regard to sex-based discrimination generally, lawyers associated with the American Civil Liberties Union presented the appeal in Reed v. Reed, 404 U.S. 71 (1971), participated as counsel for the appellants and later as amicus curiae in Frontiero v. Richardson, 411 U.S. 677 (1973), represented the appellant in Kahn v. Shevin, 416 U.S. 351 (1974), the appellees in Edwards v. Healy, 421 U.S. 772 (1975), Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 45 U.S.L.W. 4237 (March 2, 1977), and acted as counsel for petitioners, appellants, appellees, and amicus curiae in this Court in several other gender discrimination and women's rights cases.

Women's Legal Defense Fund ("Fund") is a non-profit, tax-exempt corporation founded in 1971 to secure equal rights for women, by providing volunteer legal representation in cases raising sex discrimination issues. The Fund also sponsors informational and educational

activities on legal issues of special interest to women. Many of the activities of the Fund involve employment discrimination against women.

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 522 F. 2d 850. The opinion of the United States District Court for the Middle District of Tennessee is reported at 384 F. Supp. 765 (1974).

Statute and Regulation Involved

Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) (1974) (hereinafter "Title VII"), in pertinent part provides:

> It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...sex...; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which

> would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's...sex... .

Section 1604.10(b) of the Equal Employment Opportunity Commission (EEOC) Sex Discrimination Guidelines, 29 C.F.R. §§1604.1-1604.10, in pertinent part provides:

> Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and...reinstatement... shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

Question Presented

Does an employer's policy of stripping female employees of their earned, accumulated job-bidding seniority rights following mandatory disability leave for childbirth violate Title VII of the 1964 Civil Rights Act? [2]

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[2] Also presented is the question whether an employer, consistent with Title VII, may refuse to permit female employees to (FN Continued on Next Page)

Statement of the Case

Amici incorporate the Statement of the Case set out in Brief for Respondent.

Summary of Argument

In General Electric Co. v. Gilbert, 97 S. Ct. 401 (1976) this Court recognized that a pregnancy classification may constitute sex discrimination forbidden by Section 703(a) of Title VII where it is a "mere pretext designed to effect an invidious discrimination." The employer policy in this case--stripping earned seniority rights from women on disability leave for childbirth while other temporarily disabled employees retain full job-bidding seniority--is just such a pretext.

Depriving female, pregnant employees of competitive seniority has a severe, lifelong effect upon women who combine careers with families, ensuring their relegation to less desirable jobs, permanently depriving them of income and rendering them permanently more susceptible to unemployment than their male

(FN 2 Continued) use accumulated sick leave for pregnancy-related absences.This issue is briefed in Richmond Unified School District v. Berg, No. 75-1069, cert. granted, 45 U.S.L.W. 3499 (Jan. 25, 1977), and is not addressed by amici.

colleagues of equal actual seniority. Cf. Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). The pretextual nature of the employer's policy is evidenced by the lifelong impact of the policy and its total lack of business justification. In contrast to Gilbert, the employer incurs no added cost by assuring women on brief pregnancy-related disability leaves the same job-bidding seniority accorded others temporarily unable to work. Thus no "extra compensation" issue is present. Although Title VII does not require that greater economic benefits be paid to one sex or the other "because of their different roles in the scheme of existence", by the same token Title VII hardly permits an employer specifically to burden female employees throughout their working lives because of their different role.

The Gilbert Court noted that a pregnancy classification can also violate §703(a) even absent proof of intent if it has the effect of discriminating against women. In this case the requisite showing of gender-based effect has been made. The seniority-stripping practice makes men's employment far more valuable than that of women with identical employment records. A man with the same initial date of hire and the same number of days absent for disability will, unlike Nora Satty, retain his job. His retained job-bidding seniority will entitle him to attain the more interesting and better-paying jobs, thus ensuring that he will earn more money than female,

child-bearing employees over their entire careers. This totally gratuitous burden placed on the woman who works and has children is difficult to view as other than a lingering hangover from the days when pregnancy was viewed as "obscene."

The EEOC, the agency charged with identifying specific employment practices inconsistent with Title VII, has specified that practices involving "accrual of seniority...and reinstatement ...shall be applied to disability due to pregnancy or childbirth on the same terms...as...to other temporary disabilities." 29 C.F.R. Sec. 1604.10 (b). In stark contrast to Gilbert, the factors giving the EEOC's interpretation "power to persuade" are present in this instance: (1) the interpretation is consistent with EEOC's earlier pronouncements; and (2) no position in conflict with EEOC's has been taken by any other federal authority concerned with the implementation of legislation proscribing sex discrimination.

In sum, Petitioner's invitation to this Court to adopt in Title VII's name an "anything goes" approach to personnel policies regarding pregnancies should be firmly declined. Where, as in the instant case, there is no business reason for the policy, the policy involves deprivation of an accumulated right rather than the mere withholding of an added benefit, and where the policy harms working women throughout their careers, the policy must be recognized for what it is--invidious discrimination against women.

ARGUMENT

IT IS A VIOLATION OF TITLE VII FOR AN EMPLOYER TO STRIP FEMALE EMPLOYEES OF ALL EARNED, JOB-BIDDING SENIORITY RIGHTS UPON COMMENCEMENT OF A DISABILITY LEAVE FOR CHILDBIRTH WHEN EMPLOYEES ON LEAVE FOR ALL OTHER DISABILITIES RETAIN THEIR JOB-BIDDING SENIORITY RIGHTS.

Introduction

In General Electric Co. v. Gilbert, 97 S. Ct. 401 (1976), this Court held that an employer's disability benefit plan did not violate Title VII because of its failure to cover pregnancy-related disabilities. These reasons were offered in support of the Court's judgment:

(1) Exclusion of pregnancy from a risk insurance plan is not per se gender-based discrimination;

(2) In the context of a disability benefits plan, which is nothing more than an insurance package covering some risks and excluding others, and where overall benefits to women were at least as high as benefits to men, exclusion of pregnancy could not be deemed a simple pretext for discriminating against women;

(3) A prima facie violation of Title VII is established where the effect of an otherwise facially neutral classification is to discriminate against members of one class or another, but the plaintiffs had not shown that GE's risk inclusion plan produced such effects;

(4) The relevant EEOC guideline, to the extent that it requires employers to insure disabilities caused by pregnancy on the same terms and conditions as other temporary disabilities, conflicts with the legislative history of Title VII, earlier EEOC pronouncements, interpretation by the Wage and Hour Administrator of the Equal Pay Act, and the "plain meaning" of the language of Section 703(a)(1).

The practice addressed in this brief--stripping female employees of all earned, job-bidding seniority rights when such women are disabled by childbirth, however long term their employment, however short their disability leave--is hardly comparable to the even-handed risk inclusion plan the Court described in Gilbert. Rather, the employer's seniority-stripping practice, which effects no cost savings whatever, is indeed a simple pretext for discrimination against women. The gender-based effects of the practice are as devastating as they are inevitable. The EEOC's position, declaring the practice at odds with Title VII, conflicts with no other official interpretation of equal employment opportunity requirements

and is fully consonant with the core purpose of Title VII and with the Commission's earlier pronouncements.

A. Stripping Women Employees Disabled by Childbirth of All Earned, Job-Bidding Seniority is a "Pretext Designed to Effect an Invidious Discrimination" Against Women. The Practice Serves no Valid Employer Purpose and Its Discriminatory Effect Upon Women is Both Devastating and Inevitable.

While this Court held in General Electric Co. v. Gilbert that a pregnancy classification "was not in itself discrimination based on sex," 97 S. Ct. at 407, it nevertheless recognized that a pregnancy classification may discriminate on the basis of sex

> should it be shown "that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other." Id. at 407-408.

The pregnancy classification at issue in this case is just such a pretext. The employer policy of stripping earned seniority rights from women forced to go on disability leave for childbirth and recuperation therefrom has no business justification at all. Its impact in this case was to deprive the plaintiff of her job. Its impact even on a woman fortunate enough to gain reemployment

would persist for a lifetime. The policy insures that women who combine careers with families will remain far behind male colleagues of equal actual seniority. By the simple mechanism of stripping these women of earned, job-bidding seniority, the employer assures their relegation to the less desirable jobs, permanently deprives them of income available to their male peers, and renders them permanently more susceptible to unemployment.

Nashville Gas Company, the employer in this case, forced respondent Nora Satty, after over four years as an employee, to commence maternity leave on December 29, 1972; her child was born on January 23, 1973 [3], and she returned to work as a temporary employee on March 14, 1973, close to the earliest date possible under Respondent's mandatory leave policy.[4] This temporary work ended approximately six weeks later, and no permanent post at Nashville Gas was offered to Nora Satty.

The company's policy was to allow employees temporarily disabled for a reason other than childbirth to retain full job-bidding seniority until ready to return to work. App. 44. A woman

3 Ms. Satty does not challenge here the forced leave of nearly one month prior to childbirth.

4 Petitioner required female employees to remain out of work for six weeks after giving birth. App. 65, 104.

required to stop work to give birth, however, was stripped of her accumulated seniority for job-bidding purposes. The significance of the woman's years of work for the company was reduced by Petitioner, for job retention purposes, to a simple preference over new applicants for employment.[5] The impact of this policy on Nora Satty was described by the district court:

> [p]laintiff returned from pregnancy leave as a temporary employee after more than four (4) years of continuous employment...and defendant failed to place her in one of several permanent job openings. All of these openings were filled by other employees credited with greater job-bidding seniority even though plaintiff had the earlier date of initial employment... . [F]ailure to credit plaintiff with seniority for this purpose is the sole reason she failed to gain a

5 The fact that another woman may have replaced Nora Satty when she lost her job-bidding seniority is immaterial in determining whether a violation of Section 703(a)occurred, since the law requires that no individual be discriminated against on account of sex. See, e.g., Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (positions closed to Ida Phillips because she had a pre-school child were filled predominantly by women).

> permanent position with defendant following her return from maternity leave. [6] App. 44.

As is increasingly true throughout the employment system of this country, see Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), Nashville Gas uses employee seniority as "the primary factor in the job-bidding process." App. 44. This Court noted in Franks that:

> Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ('competitive status' seniority). 424 U.S. at 766.

For this reason, the Court stressed:

> [T]he issue of seniority relief cuts to the very heart of Title VII's primary objective of eradicating present and future discrimination... . "Seniority, after all, is a right which a worker exercises in each job movement in the future, rather than a simple one-time payment for the past." Id. at 768 n. 28.

As the Court earlier explained,

> [C]ompetitive status seniority has become of overriding importance and one of its major functions is to

6 It is established that Section 703(h) of Title VII does not exempt a seniority practice which is itself discriminatory
(FN Continued on Next Page)

> determine who gets or who keeps an available job. Humphrey v. Moore, 375 U.S. 335, 346-347 (1964).[7]

In short, the importance of the issue in this case to gainfully-employed women cannot be gainsaid.[8]

In Gilbert, this Court found no basis for concluding that General Electric's disability insurance plan "worked to discriminate against any definable group or class." Indeed, the evidence indicated that GE's disability plan costs ran substantially higher for female

(FN 6 Continued) from coverage by Title VII. See Franks v. Bowman Transportation Co., 424 U.S. 747, 760 n. 16 (1976); Local 189, United Papermakers v. United States, 416 F. 2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

7 Cf., e.g., Local 189, United Papermakers v. United States, supra, 416 F. 2d at 980 (recognizing the far-reaching discriminatory impact upon black employees of maintaining a job-bidding system which gave blacks credit only for departmental seniority, not plant seniority, where the departments had previously been racially segregated).

8 Approximately half of all married women are in the labor force between the ages of 16 and 24, prior to starting a family; at least 40% of these women are employed during their mid-twenties to mid-thirties. United States Dept. of Labor, 1975 Handbook on Women Workers 19 (1975).

About 40% of pregnant women are employed during pregnancy. United States
(FN 8 Continued on Next Page)

than male employees. 97 S. Ct. at 405. The Court noted that burdening GE with insuring pregnancy as an additional risk would be tantamount to requiring extra compensation for female employees. Id. at 409 n. 17. In contrast, the employer here incurs no added cost by assuring women on brief pregnancy-related leaves the same job-bidding seniority accorded others temporarily unable to work.[9] The Nashville Gas seniority-stripping practice is simply

(FN 8 Continued) Dept. of Health, Education and Welfare, National Center for Health Statistics Report, Series 22, No. 7 at 16 (Sept. 1968).

9 Petitioner claims the policy is even-handed because employees who takes leaves for educational purposes are also denied job-bidding seniority. This claim is specious. As Petitioner conceded, App. at 42. There is simply no question that a pregnant woman at term is physically unable to pursue gainful employment for anywhere from one to several weeks. Thus, the valid comparison is not between pregnant employee and one who decides to take time off for study or travel although he or she is perfectly able physically to work, but between women employees disabled by childbirth or recuperation therefrom and other sick or temporarily disabled employees who enjoy full retention of job-bidding seniority. The voluntariness of many pregnancies, although
(FN 9 Continued on Next Page)

a device to determine which one, among competing, qualified job candidates, will get the post. Under the practice, Nashville Gas prefers employees with less company service than women in Nora Satty's situation. Absent the practice, the more senior employee would fill the vacant slot or have first option on transfer to a more desirable post.

Thus, no "extra compensation" issue is present, no added cost for employers, only the question whether a class of physically disabled workers, all of whom are women[10], may be deprived of their most crucial accumulated seniority right, and thus forced to face the immediate prospect of unemployment, as well as other long-term

(FN 9 Continued) arguably relevant in the disability insurance context (where a primary purpose of the benefit is to enable a wage-earner to cope with an unexpected loss of income), is irrelevant in this context, where no added compensation for females or cost considerations are involved.

10 It is well-established that an employer's policy may violate Section 703(a) of Title VII even though it affects only a sub-class of women workers. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

disadvantages throughout their working lives, when no other class of temporarily disabled employees is put at such a disadvantage. [11]

Gilbert held that Title VII does not require that greater economic benefits be paid to one sex or the other "because of their differing roles in the'scheme of existence'." 97 S. Ct. at 409. By the same token, Title VII hardly permits an employer specifically to burden female employees throughout their working lives because of their different role. But that, precisely, is the design and effect of the Nashville Gas seniority-stripping practice applied to Nora Satty. See Jacobs v. Martin Sweets Co., ____ F. 2d ____, 14 FEP Cases 687 (6th Cir. 1977) (post-Gilbert ruling that discharge for pregnancy violates Title VII).[12] As the Sixth Circuit put it, the Gilbert

11 Note, too, that as Petitioner reads Title VII, an employer rule requiring outright discharge of a pregnant woman would not violate the statute. Brief for Petitioner at 14-15.

12 Compare Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) (state employee's right to due process is infringed by mandatory, fixed-duration pregnancy leave), with Brief for Petitioner at 14-15 (contending that pregnancy classifications--whatever they may be--fall outside the realm of Title VII).

holding

> that exclusion of pregnancy from the risks covered by an employer's disability benefits plan does not violate Title VII, can hardly be regarded as precedent for excluding pregnancy from protection against invidious employment termination. (emphasis in original).

The Court explained that because

> pregnancy is a condition unique to women...termination of employment [or loss of job-bidding seniority] because of pregnancy has a disparate and invidious impact upon the female gender. Id. at 691.

The facts presented here--the long-term impact on women workers combined with the absence of any business justification--create a necessary inference that the Nashville Gas seniority-stripping policy is a mere pretext designed to effect invidious discrimination against women workers. As this Court pointed out in Washington v. Davis, 426 U.S. 229, 242 (1976), even in cases brought under the Fourteenth Amendment, where the plaintiff's burden is heavier than under Title VII,

> ...discriminatory impact...may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on [non-sex] grounds.

Mr. Justice Stevens' concurring opinion further explained:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. Id. at 253.

This Court has also noted, in the National Labor Relations Act context, that

> some conduct may by its very nature contain the implications of the required intent [to discriminate or to interfere with union rights]. NLRB v. Erie Resistor Corp., 373 U.S. 221 (1962).

Indeed, this Court has also stated that some conduct

> is so "inherently destructive of employee interests"... [and] carries with it "unavoidable consequences which the employer not only foresaw, but which he must have intended" [that it] bears "its own indicia of intent". NLRB v. Great Dane Trailers, 388 U.S. 26, 33 (1966).

In Erie Resistor Corp., an employer's award of "superseniority" to employees who worked during a strike had an obviously harmful impact upon the protected group of

unionized, striking workers, and was therefore held impermissible despite the absence of any showing of subjective intent to discriminate. Similarly, Petitioner's policy must be seen as a pretext to discriminate against women. For the policy, which was not shown to have any business justification, impacts solely, conspicuously, and devastatingly upon women by stripping them of a status they have earned. See "Note, Reading the Mind of the School Board: Segregative Intent and the DeFacto/DeJure Distinction," 86 Yale L.J. 317, 334-336 (1976). It must therefore be invalidated under Section 703(a) of Title VII.

B. Stripping Female Employees on Disability Leave for Childbirth of Earned Job-Bidding Seniority Rights Inevitably and Effectively Discriminates Against Women and is Therefore Prohibited by Section 703(a) of Title VII.

This Court reiterated in Gilbert that a violation of Title VII can be established by proving that

> the effect of an otherwise facially neutral plan or classification is to discriminate against members of one class or another...even absent

proof of intent. 97 S. Ct. at 408 (emphasis in original).[13]

The Court further held that the women employees in Gilbert had not made "the requisite showing of gender-based effects" because the plan at issue was an insurance package with a facially even-handed inclusion of risks, and there was "no proof that the package is in fact worth more to men than to women." Id. at 409.

In sharp contrast to Gilbert, the seniority-stripping practice at issue here does not involve an even-handed insurance program, and it makes men's employment far more valuable than that of women with identical employment

13 Justice Rehnquist's opinion in Gilbert suggested that proof of intent to discriminate might be required in cases brought pursuant to Section 703(a)(1), but that it was difinitely not required in cases brought pursuant to Section 703(a)(2) of Title VII. Ms. Satty's discrimination claim is based on both Section 703(a)(1) and 703(a)(2) of Title VII. See Complaint at par. 13(g) and (j), and par. 9, App. 5-6. She was therefore not required to prove that Nashville Gas intended to discriminate against its women workers in stripping them of earned seniority rights to establish that the company violated Title VII.

records with the Nashville Gas Company. For a man with precisely the same initial date of hire and precisely the same number of days absent for disability as a woman who goes on disability leave for childbirth will, unlike Nora Satty, retain his job. And since his seniority will entitle him to attain more interesting and better-paying jobs than child-bearing women with identical employment records, he will earn more money than they do over their entire working careers. Thus, the requisite showing of gender-based effect has been made.

Nor has Nashville Gas established a business necessity defense to this showing. Throughout this litigation, the employer has not proferred the slightest business-related justification for its policy of stripping a pregnant woman of all her earned, accumulated job-bidding seniority, however long-term her employment, however short her absence due to childbirth. While it is difficult to conceive of a valid business reason for this employer policy,[14] it is significant that Petitioner has never even suggested that its policy was related to its business needs.

14 Indeed, it would appear that the employer actually suffers by virtue of this policy, since he loses the benefit of the skills acquired by the more senior employee.

In effect, what this employer is asserting is that any employer policy relating to pregnancy is immune from attack under Title VII, because no pregnancy classification can involve sex discrimination. Thus, an employer would be free to fire pregnant women, to force them out on long leaves of absence when they are able to work,[15] to refuse to hire pregnant women, and to strip them of any and all vested seniority rights, including not only the job-bidding seniority at issue here but also benefit seniority affecting ultimate entitlement to and rights under such programs as retirement plans.

Such disparate and harsh treatment of pregnant women is not illusory; women workers have been forced to attack all these policies. On two recent occasions, this Court emphasized that working women have been the victims of "long-standing disparate treatment" and "role-typing." Califano v. Goldfarb, 45 U.S.L.W. 4237, 4240 n. 8 (March 2, 1977); Califano v. Webster, 45 U.S.L.W. 3630 (March 21,1977) (per curiam).[16] Pregnancy and childbirth

15 Cf. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

16 In Webster, the Court concluded that the 1972 Congressional change in the Social Security Act, which equalized the treatment of men and women by extending to men the three-year benefit computation advantage previously reserved for women,

(FN 16 Continued on Next Page)

have played a central role in creating this "disparate treatment" and "role-typing" of women workers. Employers have refused to train women for management positions on the grounds that women might become pregnant, Hodgson v. Security National Bank, 460 F. 2d 57, 62 (8th Cir. 1972); they have refused to hire women for other positions because they might become pregnant, Cheatwood v. South Central Bell Telephone Co., 303 F. Supp. 754 (M.D. Ala. 1969); they have fired

(FN 16 Continued) did not constitute an admission that the previous policy was discriminatory. The Court observed that

> Congress has in recent years legislated directly upon the subject of unequal treatment of women in the job market [and] may well have decided that [t] hese reforms...have lessened the economic justification for the [differential]. Ibid.

Court decisions which have uniformly invalidated the termination of female employees for pregnancy are undoubtedly part of the reason for whatever improvements in women's economic conditions Congress perceived in 1972. See, e.g., Doe v. Osteopathic Hospital, 333 F. Supp. 1357 (D. Kan. 1971); Bravo v. Board of Education, 345 F. Supp. 155 (N.D. Ill. 1972); Williams v. San Francisco School District, 340 F. Supp. 438 (N.D. Cal. 1972).

women just for getting married, Sprogis v. United Air Lines, Inc., 444 F. 2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971); and they have refused to hire mothers of pre-school age children, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

Employers without a stimulus to re-examine old notions assume that women want to, or believe that women should, spend full time taking care of their children.[17] Thus employers view these discriminatory policies as fully justified. Such customary employer beliefs blind them to the reality that a large and ever-increasing percentage of women with children are employed outside the home. In fact, one-third of all mothers with pre-school age children are in the work force, [18] and as is the case with pregnant

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17 In this case, Petitioner Nashville Gas claimed the right to determine when a pregnant employee would commence maternity leave based not only on the company's interests but also on its evaluation of "the welfare of the mother and the unborn child." App. 9-10. After childbirth, women were denied the right to return to work for at least six weeks.

18 In 1975, 32.7% of mothers with children under three years old were in the work force, as were 41.9% of mothers with children aged three to five, and 52.3% of mothers with children aged six to
(FN 18 Continued on Next Page)

women, many of them of them work out of dire economic necessity. [19] The employer view that mothers and expectant mothers are not or should not be attached to the labor market and therefore may be deprived of standard seniority rights and employment offered other workers is not only inaccurate and unfair to women workers; it can also have severe consequences for the economic well-being of women's families. This impact will be most severe on minority families, since a disproportionate number of them are

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(FN 18 Continued) seventeen. United States Bureau of the Census, Current Population Reports, A Statistical Portrait of Women in the United States, Table 7-5 (Series P-23, Report #58, (1976). See also the statistics cited in Taylor v. Louisiana, 419 U.S. 522, 535 n. 17 (1975).

19 Two-thirds of the 36 million women in the labor force work because of pressing economic need; either they are single, widowed, divorced, or separated, or they have husbands earning less than $7,000 per year. United States Dept. of Labor, Women's Bureau, Why Women Work (rev. ed. 1975). According to the Census Bureau, women appear to constitute the largest identifiable group of poor people in the nation. United States Bureau of the Census, Female Family Heads (Series P-23, Report #50, 1974).

headed by women.[20]

A totally gratuitous burden placed on the woman who works and has children is difficult to view as other than a lingering hangover from

> the days, extending into this century, when pregnant women were forced to remain at home--when pregnancy was viewed as "obscene". Koontz, "Childbirth and Childrearing Leave: Job-Related Benefits," 17 N.Y.L. Forum 480 (1971).

Cf. Cleveland Board of Education v. LaFleur, 414 U.S. 632 n. 9 (1974)(noting that the pregnancy policy at issue in that case had originally been inspired by a desire "to save pregnant teachers from embarassment at the hands of giggling school children," that pregnant women were forced off work at four months "because this was when the teacher 'began to show'," and that one employer thought students should not be exposed to pregnant teachers,

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20 Among white families, 10% of all families are headed by a woman; among black families, 35% are headed by a woman. United States Bureau of the Census, A Statistical Portrait, supra, Table 13-7. Among female-headed families, 24.9% of the white families were below the low-income level, as were 52% of the black families. Id. at Table 13-18.

"because some of the kids say, my teacher swallowed a watermelon, things like that." Certainly, Petitioner's asserted right to make a decision as to when Nora Satty should stop work based not simply of the company's interest but on her interest and that of her "unborn child", App. 10, 29-30,suggests a paternalism inappropriate to modern conditions, as does its policy of requiring women to wait until at least six weeks after childbirth before attempting to return to work. App. 65, 104.

In short, Petitioner invites this Court to open wide the doors to pernicious sex discrimiantion subjecting women to irremediable harm, by effectively adopting in Title VII's name an "anything goes" approach to personnel policies regarding pregnancy. This invitation should be firmly declined. Where, as in the instant case, there is no rhyme or reason for the policy, where the policy involves deprivation of an earned status or accumulated right rather than the mere withholding of an added benefit, where the policy harms working women throughout their entire working lives, the policy must be recognized by this Court for what it is--invidious discrimination against women with the effect of keeping them at the bottom of the ladder.

C. The EEOC Sex Discrimination Guideline, to the Extent That It Prohibits the Practice at Issue, is Entitled to Deference.

Congress left it to the EEOC to identify with specificity employment practices inconsistent with Title VII. As to the practice in question here, the EEOC specified:

> Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority...and reinstatement... shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. 29 C.F.R. §1604.10 (b).

In stark contrast to Gilbert, the factors giving EEOC's interpretation "power to persuade" are plainly present in this instance: (1) the interpretation is consistent with EEOC's earlier pronouncements; and (2) no position in conflict with EEOC's has been taken by any other federal authority concerned with the implementation of legislation proscribing sex discrimination.

In Gilbert, a prime factor detracting from deference to the EEOC's 1972 position was the flatly contradictory position EEOC had taken at an earlier date. But in this case, no such

impediment exists. For the 1972 EEOC interpretation relevant here, i.e., the Commission's position on seniority and reinstatement, is fully consistent with EEOC's prior opinions. As early as 1966, the EEOC took the position that effective implementation of Title VII necessitated policies affording female employees reasonable job protection during pregnancy. EEOC First Annual Report to Congress 40 (1965-66). See also EEOC First Annual Digest of Legal Interpretations, July 1965-July 1966, Opinion Letter GC 218-66 (June 23, 1966).

Well before 1972, formal EEOC decisions reflected the agency's clear judgment that employer policies relating to termination on account of pregnancy and childbirth discriminated against women workers. See, e.g., CCH EEOC Decisions (1973) ¶6125 (June 16, 1969) (termination of an employee on the basis of pregnancy violates Title VII); CCH EEOC Decisions (1973) ¶6084 (December 16, 1969) (outright discharge based on refusal to place women on leave status for childbirth violates Title VII); CCH EEOC Decisions (1973) ¶6170 (September 17, 1970) (firing pregnant women in the sixth month of pregnancy violates Title VII); CCH EEOC Decisions (1973) ¶6184 (December 4, 1970) (termination of all unmarried pregnant employees, termination of married pregnant employees with less than two years service, and denial of reemployment absent a vacancy to married pregnant women with more than two years service violates Title VII.) On the

other hand, employer policies providing for full reinstatement following childbirth leave were approved by the Commission. See Case No. LA-68-4-538E, 2 FEP Cases 537 (June 16, 1969).

Furthermore, here, unlike Gilbert, no federal agency has promulgated regulations which conflict with the EEOC's position. In this case, the Equal Pay Act regulations are simply inapposite, since the Equal Pay Act does not deal with the terms and conditions of employment, such as seniority practices, or with hiring and firing practices, but simply prohibits a narrowly-defined form of wage discrimination. See 29 U.S.C. § 206 (d).[21] Moreover, to implement Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq. (1974), the Department of Health, Education, and Welfare has adopted regulations, subsequently accepted by Congress, which explicitly take the same position as the EEOC guideline at issue. See 45 C.F.R.

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21 Senator Humphrey's remarks, cited in Gilbert but not fully analyzed there, suggest that the Equal Pay Act covers employment terms and conditions other than wages, since he asserted that the Equal Pay Act authorized employers to retire women earlier than men. However, this statement was clearly erroneous. See the Equal Pay Act, 29 U.S.C. § 206(d) and Manhart v. City of Los Angeles, ____ F. 2d ____, 13 FEP Cases 1625, 1631 (9th Cir. 1976).

§86.57(c):

> A recipient shall treat childbirth ...as any other temporary disability for all job related purposes, including...accrual of seniority... .

In sum, the Commission's position on seniority and reinstatement fully merits the deference generally accorded EEOC guidelines by the courts. See, e.g., Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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April, 1977

No. 75-536

Supreme Court of the United States

October Term, 1976

NASHVILLE GAS COMPANY,

Petitioner,

v.

NORA D. SATTY,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INTERNATIONAL UNION, UAW AS AMICI CURIAE

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INDEX

CITATIONS

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MOTION BY AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INTERNATIONAL UNION, UAW FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America hereby respectfully move for leave to file the attached brief *amici curiae* in the instant case, as provided for in Rule 42 of the Rules of this Court. Counsel for appellees have consented to the filing of that brief, but counsel for appellants have refused such consent.

INTEREST OF THE AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 109 national and international unions, having a total membership of approximately 14,000,000 men and women.

Women comprise a substantial portion of the membership of AFL-CIO affiliated unions.

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") is a labor union representing approximately 1,300,000 members, many of whom are women.

The AFL-CIO and the UAW have appeared together previously before this Court representing the interests of women union members in equal employment rights. See, e.g., *Liberty Mutual Life Ins. Co.* v. *Wetzel,* 424 U.S. 737; *General Electric Co.* v. *Gilbert,* ..... U.S. ....., 45 U.S.L.W. 4031.

ISSUES TO BE COVERED

This case involves two policies applicable to women who bear children: denial of accumulated sick leave and loss of accumulated job-bidding seniority. The latter question is one of particular interest to the labor movement, for the seniority principle has long been a union goal in collective bargaining. And the sick leave issue is, in the context of this case, directly linked to the seniority question, since sick leave is itself accumulated on a seniority basis and represents the efforts of employees' work in the past.

The attached brief discusses the validity of these policies under Title VII of the Civil Rights Act of 1964, with particular reference to Section 703(a)(2) of that Act. It is our understanding that the parties and other amici will not concentrate on the meaning and pertinence of that particular subsection. In addition, because of our long experience with both representation of women in the workplace and the seniority principle, we believe we are able to present perspectives on both the meaning and functions of

competitive seniority and the historical association between gender-related stereotypes and pregnancy policies which will not otherwise be covered.

CONCLUSION

Because the attached brief covers an issue not otherwise discussed by the parties and presents background material which will be of use to the Court, this motion should be granted.

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BRIEF FOR THE
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AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AND
INTERNATIONAL UNION, UAW
AS AMICI CURIAE

SUMMARY OF ARGUMENT

This case presents directly the question of the validity of two employment practices applied to women who bear children: first, whether women may be denied the use of accumulated sick leave while disabled during the period surrounding childbirth, and second, whether they may be permanently replaced and denied accumulated job-bidding seniority even if they are absent due to childbirth only as long as they are medically unable to work. In Part I, we demonstrate that, while petitioner attempts to cast these practices as the simple disparate treatment of pregnancy related disabilities, in fact the policies are based directly upon the gender-related stereotype that women who bear children want to, and ought to, attend to their domestic responsibilities when they are preparing for childbirth and caring for an infant. We also discuss the ramifications

of the deprivation of seniority for both the women affected and the employer, and show that the deprivation of seniority is both critical to the women's future employment prospects and contrary to the economic and efficiency interests of the employer.

In Part II of the brief we illustrate, first, that precisely the gender-related stereotype underlying the Company's policy here accounts in large part for the fact that women are relegated to low-paying, low-status jobs when they are employed. Second, we argue that deprivation of accumulated job-bidding seniority on the basis of such a stereotype is therefore necessarily directly within the prohibition imposed by § 703(a)(2) of Title VII, and that *Gilbert* v. *General Electric Co.*, ... U.S. ....., 45 U.S.L.W. 4031, upon which petitioner relies, is consequently inapposite; *Gilbert* was litigated and decided solely under § 703(a)(1) and did not even raise questions determinable under § 703(a)(2).

In Part III, we discuss briefly the policy excluding the use of accumulated sick leave for disabilities while on "pregnancy" leave and show that this policy as well violates Title VII. Unlike the exclusion in *Gilbert*, the policy does not merely prevent women from receiving benefits *in addition* to those otherwise available. And, the sick leave policy is inseparable from, and part of the expression of, the same gender-related stereotype which the entire treatment of women who bear children reflects.

ARGUMENT

I.

THE COMPANY'S POLICIES APPLICABLE TO WOMEN WHO BEAR CHILDREN ARE BASED UPON A GENDER-LINKED STEREOTYPE.

This case involves the legality, under Title VII of the

Civil Rights Act of 1964, of certain of petitioner Nashville Gas Company's (hereafter "the Company") personnel policies applicable to women who become pregnant and bear children while employed by the Company. Two aspects of the policies applicable to such women are directly before this Court: first, the refusal to permit women on "pregnancy" leave and unable to work for medical reasons to use accumulated sick leave, available to other employees disabled by a non-occupational sickness or accident; and second, the refusal to allow such women to retain, as other employees absent for medical reasons do,[1] their job seniority for all purposes.

To evaluate the legality of these two policies, however, it

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[1] The Company represents that employees who are absent due to disability are placed on formal leave after their sick leave has been exhausted and do not retain seniority for job bidding purposes. (Br. for Petitioner, at 4, 24). However, the district court found that "employees returning from long periods of absence due to non-job related injuries do not lose their seniority * * *. Only pregnant women are required to take leave and thereby lose job bidding seniority." (App. 45, 51). Similarly, the Court of Appeals noted that: "The employee who is placed on pregnancy leave, *unlike the male employee who is absent due to a nonwork-related disability*, loses her accumulated seniority for job bidding purposes but otherwise retains her accrued vacation and pension seniority." (App. 104, emphasis supplied). And, the record confirms that other employees who have exhausted their accumulated sick leave and remain absent due to disability *are* able to return with full seniority. For example, one employee who was absent due to illness for ten months at a time when she could not have accumulated more than 7½ months sick leave (see App. 97) was returned to her old job with full seniority back to date of hire. (App. 24-25). Thus, the Company's representation that some disabled employees other than pregnant women lose job-bidding seniority is not consistent with either the findings below or the record, and should be disregarded.

is useful to place them in the context of the entire complex of childbirth-related employment policies. For once that is done, it becomes apparent that these policies have no independent purposes or justifications but, instead, are part of an overall program designed with a gender-related stereotype at their core—specifically, that a woman who gives birth to a child will want to, and ought to, remain at home with the infant for a substantial length of time, even though she is physically able to return to work.[2]

The Company provides all of its employees with paid leave for absences due to physical inability to work. (App. 96). The amount of leave and the amount of pay during leave are linked to two factors: (a) seniority with the company[3] (b) the history of the employee's use of sick leave.[4] There is no explicit exclusion from this policy for disabili-

[2] It is our contention that employment-related policies designed on the basis of a gender-related stereotype and affecting solely members of a single sex violate § 703(a)(2) of Title VII where, as with the policy here in question, they "deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee." (See pp. 26-30 *infra*).

[3] The leave period and pay during leave is calculated according to the following schedule:

Length of Service	Time allowed with Full Pay	One-half Pay
Up to 1 year	1 week	
1 year to 2 years	2 weeks	2 weeks
2 years to 5 years	3 weeks	6 weeks
5 years to 10 years	4 weeks	8 weeks
10 years to 15 years	6 weeks	12 weeks
15 years to 20 years	7 weeks	16 weeks
20 years to 30 years	8 weeks	24 weeks
30 years and over	9 weeks	30 weeks (App. 97).

The amount of leave shown on the table is all that an employee may use within any twelve month period, except if they have earned a

ties caused or related to pregnancy, and it appears that the Company does permit pregnant women to draw upon their sick leave allowance while pregnant, *until* the "pregnancy" leave discussed below begins.[5]

The Company's stated policy as regards a special leave for pregnant women is:

> "In case of pregnancy, an employee, upon written request, may be granted a leave of absence up to one year. It is considered best that the employee leave the Company at least five months prior to the expected birth. If the employee desires to return to work, the company will make every effort to place her in the first available position for which she is qualified and eligible and acceptable by the Department Head in accordance with

premium for non-use of sick leave in past years (see n.4, *infra*). In addition, leave allowance is further linked to seniority in that an employee with less than two years service must ordinarily be out two days before any pay can be collected, and an employee with two to five years service must usually wait one day. (App. 97-98).

[4] An employee may not, apparently, accumulate unused sick leave from one year to the next. However, for each year the employee uses *no* sick leave, he can add one week of full pay leave, up to double the full pay leave to which he is otherwise entitled. (App. 97). Further, an employee who frequently uses sick leave may have a waiting period imposed on later use, and "abuse of the sick leave privilege will be cause for forfeiture of all future rights to paid sick leave." (App. 98).

[5] The stated policy of the Company is not to pay sick leave to employees "*who go on pregnancy leave.*" (App. 13, 32: see also App. 38.) There is no exclusion from the standard sick leave plan for pregnancy-related disabilities occurring before the "pregnancy leave," (App. 97-98) and it appears, for example, that when Ms. Satty was ill for four days in part due to a pregnancy-related problem before her "pregnancy" leave began, she was treated as any other disabled employee. (App. 81-82).

the employment policies." (App. 98).

As the district court noted, while the policy speaks of a "request" for leave, in fact an employee who is having a child *must* take a leave of absence.[6] (App. 33). While the beginning of the leave is determined individually, the Company does reserve the right, exercised in Ms. Satty's case, to require a leave to begin before the employee and her doctor determine it to be necessary, and to consider factors other than the health of the woman and child. (App. 29-30, 63). Further, the Company also has refused to permit women to return to work after childbirth until after a prescribed period has elapsed, even if they would like to and are able to return. (App. 64-65, 86).

Most significantly, a woman placed on leave of absence for childbirth loses all job-bidding seniority she has acquired while working, regardless of the length of her absence, and regardless of whether her absence was solely due to disability or included some period when she could have worked but preferred, for personal reasons including care of the infant, to remain at home. The possible results of this deprivation of accumulated seniority are various.

First, while the Company says it will attempt to return a woman from pregnancy leave to a position should one become vacant, it is clear that the woman will almost never be

[6] This appears to be so even though women are paid for accumulated *vacation* time, although not sick leave, while on leave. (App. 104). Thus, even if a woman had a three-week vacation due her and was able to return to work within three weeks of the date she left to have a child, she would still be regarded as having taken a pregnancy leave, with the consequences for her right to return to her job described below. The result is that an employee absent for three weeks to go fishing would lose no employment rights, while a woman absent to bear a child would.

able to return to her previous position. Any employee of the Company hired up to the time she is ready to return, including those hired while she was on leave, will have preference over her as regards that position. Second, for similar reasons, if a permanent position were available on the day the woman wished to return, it would almost certainly be a position lower in the job progression than that which she left.[7] Third, the woman is likely to be out of work altogether for much longer than she desires to be. Since an appropriate permanent position is unlikely to be available, her former position will have been filled and, as Ms. Satty's situation shows, temporary jobs are exactly that—temporary. Fourth, it is entirely possible that no appropriate job would open up at all during the year's limit on the leave of absence. If so, even the preference over non-employees available to those on leave would disappear and she would be out of work entirely.[8] And fifth,

[7] The only situation in which this would not be so would be if she had not been employed long enough to progress beyond the lowest job category. As this example shows, the seniority-stripping policy actually has the effect of penalizing women *more* the longer they have been with the company.

[8] Although Ms. Satty terminated her employment in order to receive unemployment benefits, it is apparent that had she not done so, she would nonetheless not have been returned to a permanent position. For the Company did not hire *any* new employees in any position for which Ms. Satty was qualified until after her year's leave would have expired. (App. 34). Thus, Ms. Satty's situation does illustrate that the "pregnancy" leave policy can amount to termination of employment rights entirely; and, in fact, two of the other four women on "pregnancy leave" between December, 1972 and July, 1974 never returned as permanent employees and were ultimately terminated "due to reduction of force." (App. 33; see also App. 87).

if the woman *was* able to return to a permanent position, she could not only be relegated to a lower paying, lower status job than that she left but, because she has lost all credit for job-bidding purposes for time worked before leave, she would, for the rest of her career in the company, lose opportunities to individuals first employed after she began work but before she returned from leave. It is likely, therefore, that her relatively low pay status would continue, and that, in the event of layoffs, she would lose her job while others employed for shorter periods would be retained.

The result of these policies is certainly harsh when viewed from the perspective of the woman involved: a lengthy loss of income, the possible loss of employment entirely, and the prospect of a permanent depression of wages and promotion opportunity if she does return to work. Indeed, where a seniority system is in effect,

> "[S]eniority may be the most valuable asset of an employee of long service. It is both the symbol and the realization of a worker's expectations, expectations reinforced by a sense of rightness of the basic principle of length of service." Summers and Love, *Work Sharing as an Alternative to Layoffs by Seniority: Title VII Remedies in Recession,* 124 U. Pa. L. Rev. 893, 902-903 (1976).

The seniority principle, in fact, "expresses in a form appropriate to particular industrial situations the notion that people acquire property-like rights in employment opportunities." Meyers, *The Analytic Meaning of Seniority,* in Proceedings of the Eighteenth Annual Meeting, Industrial Relations Research Assoc. (1966), at 8. Precisely because of its perceived character,

> "Rejection of the principle of seniority where a seniority system has been established [is] disruptive and demoralizing * * *, for it [is] viewed as depriving employees of rights earned in accordance with a just principle. * * * To disregard the order of seniority by giving priority to a junior over a senior worker [is] viewed as taking rights away from one person and giving them to another." *Title VII Remedies in Recession, supra,* at 903-904.

Thus, stripping women who become pregnant of job-bidding seniority necessarily entails more than the loss of particular advantages. It entails also a declaration that the *past* as well as future efforts of women who bear children when employed are to be less rewarded than those of other employees, and that such women, alone of all employees who continue to work except when physically unable to do so, are not entitled to the "expectation that * * * earned rights will not be divested absent a compelling cause." *Id.,* at 903.

At the same time, the result of the Company's policies here at issue is also entirely contrary to its *own* economic and efficiency interests.[9] First, as a result of these policies, experienced employees are displaced in favor of inexperi-

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[9] It is significant in this regard that the Company appears to have instigated the seniority system on its own, and not as the result of collective bargaining. This illustrates what many commentators have noted—that while the development of the seniority principle has been a major concern of unions, the principle has benefits in forwarding efficiency and productivity, raising morale, and assuring consistency in personnel decisions in large organizations which has led many, and probably most, sizeable, nonunionized employers to develop a seniority system. See, e.g., Feller, *A General Theory of the Collective Bargaining Agreement,* 61 Calif. L. Rev. 663, 720-724, 768-769 (1973); National Industrial Conference Board, Inc., *Seniority Systems in Nonunionized Companies* (1950); N. Chamberlain, *Source Book on Labor,* 673, 675-78

enced employees.[10] While in some companies the need for continuity in jobs may be great enough to merit this displacement, the Company here has a policy of ordinarily permitting disabled employees on sick leave to return to their former positions even after long periods of absence.

(1960); H. Vollmer, *Employee Rights and the Employment Relationship*, p. 25 (1960.

For example, one company noted that, in determining layoffs, "we keep the older employees because their attitudes are good. They are very loyal • • •." National Industrial Conference Board, *supra*, at 6. Others stress that they use seniority in making personnel decisions because, since "[a]ccurate determination of merit or competency is not easy • • • except where it is extremely evident on the basis of work record," action based on subtle merit judgments "might • • • lead to endless arguments and grievances," thus disrupting production and creating a sense of injustice among the employees which can hamper efficiency. (*Id.*, at 6, 7, 9). Further,

> "management has accepted seniority because it has recognized that those making the employment decisions may at times be arbitrary and that arbitrariness is costly in terms of maintaining plant morale and retaining valuable employees. [Also], [f]rom the standpoint of • • • top management • • •, the application of seniority at the operating level is simple to oversee and • • • economical to administer." *Title VII Remedies in Recession, supra*, at 901, 902 (1976).

Finally, since "seniority enables an employee to acquire valuable interests by his work, to capitalize his labor and obtain something more than a day's wages for his continued production," (*Id.*, at 902), reliance on that principle serves management interests by providing an incentive to continued employment of the same employees and thereby reducing costly turnover.

[10] In Ms. Satty's case, the district court found that her former job was abolished entirely (App. 52). It is clear, however, that the *policy* is to replace permanently a woman on pregnancy leave, and not to hold her job open no matter how soon she promises to return. (App. 10, 30, 97).

(App. 18-29, 45). Thus, the Company itself apparently recognizes that it is usually more efficient to permit experienced employees to continue in their jobs when they return from absences caused by disability than to permanently replace them, but, for reasons never explained, it does not apply this recognition to women placed on pregnancy leave.

Second, the Company seniority policy itself is plainly based, at least in part, upon the recognition that continuity of employees is desirable and should be encouraged. Turnover is expensive in training costs, and long-term employees are likely to be more loyal to the Company and committed to its interests. (See n. 9, *supra*). Yet, the treatment of pregnant women results in forced discontinuity of employment for a group of employees, with the result that women who intend to bear children have little incentive to remain with the company before their child-bearing begins; they will necessarily lose the right to continue normally in their career once they do have children, and advantages due to continuity before that time will be lost.

Further, the seniority job-bidding system also necessarily recognizes that employees are more likely to be motivated to perform less responsible jobs efficiently if they believe that they have a fair opportunity to advance. Women who, upon return from "pregnancy" leave, are relegated to less responsible jobs than those they left, and will have to work in those jobs for some time before even reaching their former status, are unlikely to exhibit the commitment which a fair advancement system is designed to foster.

Thus, the Company's treatment of women who become pregnant seems entirely contrary to its own interest, and to the purposes of the seniority system it has unilaterally es-

tablished. The explanation for the policy cannot, therefore, lie, as in *Gilbert, supra,* in any legitimate, neutral business purpose such as cost saving or efficiency.[11] Rather, it is apparent that the Company has refused to adopt any policy at all regarding the *disability* caused by a normal pregnancy. Instead, the Company has chosen to provide for what is in essence a child care leave—that is, a period to allow women who have children to stay home to prepare for and take care of the infant for some time without losing *entirely* employment rights.

For a woman who has made the *choice* to forego employment for six months or one year in favor of full-time motherhood, the treatment accorded by the Company may make sense: the length of her absence is likely to be much longer than any sick leave she had accumulated through seniority; the analogy to an education leave, which the Company relies upon heavily (see Br. for Petitioner, at 24), has some validity;[12] and the Company may feel that the very purposes underlying a seniority system—fostering continuity of employment and orderly career development—justify rewarding persons who do not absent themselves for lengthy pe-

[11] Indeed, deprivation of job-bidding seniority not only will not save the Company any money but where, as here, the woman is ultimately terminated because no jobs become available and therefore collects unemployment benefits, the employer's unemployment tax rate can increase, resulting in a cash *loss* due to the seniority policy. See U.S. Department of Labor, *Comparison of State Unemployment Insurance Laws* (rev. 1975), at 2-4 to 2-7 & Tables 200-202.

[12] Both education leave and "child care" leave are voluntary in that they are not precipitated by any physical necessity; and both involve a decision of the individual to pursue an activity other than employment full-time, for personal reasons and, presumably, perceived self-fulfillment.

riods for reasons of personal preference or to pursue another activity.[13]

But it is quite clear on this record that Ms. Satty made no such choice. She had informed the company of her intent to return as soon as she could, she was ready to return to work shortly after her child was born, and she did in fact return six weeks after childbirth, the soonest the Company allowed, to the temporary position available under the Company's policy. (App. 64-65). It is also clear from the record that many employees disabled longer than Ms. Satty were returned to their former status, and that the failure to reinstate here therefore could not have been linked to the length of her absence.

The conclusion is plain: the Company's policy was predicated upon the assumption that women who bear children *would,* or ought to, stay home and care for their infants, and made no particular provision at all for women who did not conform to that stereotype. Since the Company does not force nor, indeed, as far as appears, allow men to take leave to care for children, the policy is based directly upon a gender-linked stereotype, and not upon pregnancy as such nor any special characteristics of pregnancy related disabilities.

II.

PREGNANCY LEAVE POLICIES BASED UPON A GENDER-LINKED STEREOTYPE VIOLATE § 703(a)(2) OF TITLE VII.

A. *History of pregnancy leave policies*

The assumption that women will marry, become pregnant

[13] Of course, other employers may—and many do—decide that they can assure loyalty and efficiency most efficiently by permitting a child-care leave of limited duration to employees with a guarantee of return to the same seniority status, hiring temporary rather than permanent replacements in the interim.

and leave the labor market is at the core of the sex stereotypes resulting in disparate treatment of men and women in the work place. And, conversely, since approximately 80 percent of all women bear children (U.S. Bureau of the Census, "Fertility Expectations of American Women: June 1974," *Current Population Reports,* Series P-20, No. 277 (1975), Table 12), employment policies, such as those here at issue, which permanently and significantly depress the job status of women who bear children while employed, are themselves responsible in large part for the fact that women remain relegated to low-paying, low-status jobs.[14] A brief historical survey will aid, we believe, in perceiving the inextricable connection between pregnancy leave policies which force a discontinuity in employment and loss of a valued, earned employment right, and employment discrimination against women generally.

From early times in this country, the concept of the natural role of woman as that of wife, mother and homemaker has shaped and dictated her treatment in the labor market. Justice Bradley of this Court spoke not only for the concurring justices but for the society of his time when he proclaimed, in 1873, that:

> "[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman * * *. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family

[14] *See* U.S. Department of Labor, *Handbook on Women Workers* (1975), at 4.

> institutions is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband."

(*Bradwell* v. *Illinois,* 83 U.S. (16 Wall.) 130, 141, 21 L.Ed. 442 (1873) (concurring opinion of Bradley, J.).

The view that women belonged at home, rather than in the workforce, persisted into the 1920's. In expression of the prevailing view, women participating in the American Institute of Banking convention in 1923 were told that they were "merely temporary employees" in the nation's banks and businesses and that their goal should be to return home. W. Chafe, *The American Woman* (1972), p. 64. And the Depression of the 1930's only intensified negative attitudes toward working married women; the practice of refusing to hire married women increased, and whole cities campaigned for the firing of working wives, while most state legislatures considered bills to restrict the employment of married women. W. Chafe, *The American Woman,* pp. 100, 108-109; P. Pruette, *Women Workers Through the Depression* (1934), pp. 104-105.

During World War II, the manpower shortage resulted in an unprecedented influx of women into the labor force, and forced a reassessment of policies and practices affecting working women. The Government, through the Department of Labor, played an active role in seeking to make the working world more hospitable to women, including wives and mothers.[15] A primary concern of the Department of

[15] The War Manpower Commission issued a statement of policy on recruitment, training and employing of women workers which recommended, *inter alia,* equal treatment of women workers in hiring, training and wages. See "Policy of War Manpower Commission on Women Workers," *Monthly Labor Review,* Vol. 56, No.

Labor was the prevailing employer practice of terminating women workers upon discovery of pregnancy. See, e.g., C. Silverman, "Maternity Policies in Industry," 8 *The Child* 20, 21 (Aug. 1943); J. Mohr, "The Industrial Nurse and the Woman Worker," (Women's Bureau Spec. Bull. No. 19, 1944), p. 29; "Touchy Problem," *Business Week* (Sept. 25, 1943), p. 80; International Labour Office, *The War and Women's Employment* (Montreal, 1946), pp. 230-233.

In particular, during the war, the Children's Bureau did an investigation of employer reasons for terminating women as soon as they were known to be pregnant. The Bureau found that while many employers responded that they did it to protect the woman's health or because of the diminished efficiency of an employee who is pregnant, and expressed a fear that pregnant women might miscarry and blame her occupation, both reasons were pretexts. For, of all of the employers surveyed, only one reported an incidence of miscarriage, and "[a]ll the medical directors that were interviewed agreed that it is in the first three months of pregnancy that the danger of miscarriage is greatest and that practically all the pregnant women remained at work during this period, as it is unusual for pregnancy to be reported so early." C. Silverman, "Maternity Policies in Industry," *supra*, pp. 21-22.[16]

4 (1943), pp. 669-671; "Standards for Women's Employment in Wartime," *Monthly Labor Review*, Vol. 56, No. 6 (1943), p. 1120.

[16] Dr. Silverman further reported that many employers gave "esthetic and moral" reasons for terminating pregnant women:

> "In many plants it was stated that it was 'not nice' for obviously pregnant women to be working in a factory and that such employment had a bad effect on the male employees, who made it a subject of frequent comment and were distracted from their work." (*Id.* at p. 22).

The degree to which the old stereotypes persist can be seen in the

To combat early dismissal of pregnant women the Woman's Bureau, in conjunction with the Children's Bureau, issued a statement of standards for maternity care and employment of mothers in industry, recommending that pregnancy not be grounds for dismissal. An important aspect of the Bureau's standards was its recommendation that a woman be permitted to return to her former job, or if it were unavailable, another job of equivalent value, at the current wage paid for the job. Accumulation of seniority for 3½ months of the leave and retention of seniority thereafter and the use of sick leave and vacation pay were also recommended. See, U.S. Women's Bureau *Union Provisions for Maternity Leave for Women Members*, Union Series No. 3 (1945); C. Silverman, "Maternity Policies in Industry," *supra*, pp. 23, 24.

Despite its efforts and the support of organized labor, the Women's Bureau made little headway toward the acceptance of its standards by the war's end. "Women Will Stay," *Business Week* (May 12, 1945) pp. 102-103. *Business Week* reported:

> "A survey of 92 midwestern * * * war plants recently revealed that only five recognize maternity as a basis for leave, although in a number of others a contract provision covering illness sometimes is broadly construed as including pregnancy. In many plants, however, pregnancy is a basis for layoffs with resulting loss of seniority, vacation, and other length of employment rights." (*Id.* at 103.)

fact that in this case, Ms. Satty's supervisor, in a conversation regarding when Ms. Satty would begin her "pregnacy" leave, "made a remark that some women when they are pregnant get so big that they look miserable [and] * * * said he would consult [me] when [to] take [my] leave." (App. 81).

And, as the men returned from war, attitudes toward women workers reverted almost overnight to those prevailing before the war. Despite indications that most of the women who entered the labor force during the national manpower shortage wished to continue working (see International Labour Office, *The War and Women's Employment, supra,* pp. 264-267; "Women War Workers' Post-War Job Plans," *Monthly Labor Review,* Vol. 59, No. 3 (1944), pp. 589-590), women were laid off in enormous numbers.[17] Some companies laid off, without regard to seniority, all wives with working husbands. See "Workers' Wives Go First," *Business Week* (Jan. 29, 1944), p. 103; "Employers' Post-war Plans for Women Workers," *Monthly Labor Review,* Vol. 60, No. 6 (1945) p. 1269. The lesson of World War II was clear, indeed: women were still the marginal workers, who, in time of national need, would be called upon to carry on the nation's work, but when the emergency was over, were sent home where they belonged. W. Chafe, *The American Woman,* pp. 177-180.

Nonetheless, the wartime experience permanently changed the work aspirations and patterns of women. Many of those who were laid off from the higher paid war industries found work in traditional "women's" jobs,[18] and their numbers steadily increased in the decades that followed.[19]

[17] See, e.g., "Effects of Cutbacks on Women's Employment," *Monthly Labor Review,* Vol. 59, No. 3 (1944), p. 585; "Women's Tendency to Leave the Labor Market," *Monthly Labor Review,* Vol. 59, No. 5 (1944), p. 1029.

[18] M. Pidgean, "Women Workers and Recent Economic Change," *Monthly Labor Review,* Vol. 65, No. 6 (1974), pp. 668-669.

[19] The labor force participation rates of women rose from 1950 to 1974 from 33.9 percent to 45 percent, and the percentages of workers who are women from 29 to 39 percent. U.S. Department of Labor, *1975 Handbook on Women Workers,* p. 12. The percentages of married women, and of mothers, working increased even more dramatically: in 1950, 24.9 percent of married women were in the work force, while in 1974 43.8 percent of such women were labor market participants. (*Id.,* at 18). And while in 1950 only 20.2 percent of mothers were in the labor force, by 1974 the percentage was 45.7 percent. (*Id.,* at 28). Especially noteworthy, for purposes of this case, is that about one-third of women with children under three, and 37 percent of those with children under six, were in the work force in 1974, while in the immediate post-war years less than 15 percent of women with children under six were in the labor market. (*Id.,* at 26-27).

See, generally, W. Chafe, *The American Woman, supra,* Chapter 8. Yet by 1964, the effective date of Title VII, more than forty percent of companies surveyed by the National Industrial Conference Board still did not even provide *unpaid* maternity leaves of absence for women.

In the period between 1969 and 1973 there was a marked improvement in employer practices. R. Quinn, *et al.,* "Evaluating Working Conditions in America," *Monthly Labor Review,* Vol. 96, No. 5 (1973), pp. 32, 37. In 1973, seventy-three percent of the women workers surveyed by Quinn reported that they were entitled to maternity leave with full reemployment rights as compared to 59 percent in 1969. Twenty-six percent reported the availability of maternity leave with pay as compared to fourteen percent in 1969. *Id.,* at 37, Table 4. See also, U.S. Dept's of Labor and Health, Education and Welfare, *Manpower Report to the President* (1975), p. 72; National Industrial Conference Board, *Profile of Employee Benefits,* Conference Board Report No. 645 (1974), p. 42.

Yet, as this case illustrates, many women are still fired for becoming pregnant, prevented from returning to work

when physically able, denied income maintenance through accrued sick leave when absent, and deprived of accumulated seniority when they are allowed to return. Since the significant majority of women become pregnant at some point in their working lives (see p. 14, *supra*), women in general are deeply affected by employer practices relating to pregnancy and expressive of the assumption that women who bear children are not, and ought not to be, permanently attached to the work force.[20] And the pregnancy rules themselves, in turn, contribute to making this assumption a self-fulfilling prophecy.

B. *Title VII and Seniority Discrimination Against Women who Bear Children*

1. In light of the significant degree to which rules denying critical employment rights to women who bear children, including, as in this case, the right to be employed at all,

[20] Even the small percentage of women workers who never become pregnant do not escape the effects of the employer's concern about pregnancy. Women applying for jobs find they are asked about family plans and what method of birth control they use and, based on the possibility that they might become pregnant, not offered certain jobs or placed in the low paid, dead-end jobs which characterize women's place in the labor force today. See, generally, U.S. Dept's. of Labor and Health, Education, and Welfare, *Manpower Report to the President* (1975), *supra*, pp. 60, 61; *Report of the Twentieth Century Fund Task Force on Women and Employment: Exploitation from 9 to 5* (1975), p. 60. Cf. *Cheatwood* v. *South Central Bell Telephone & Telegraph Company*, 303 F.Supp. 754, 759-60 (M. D. Ala. 1969) (all women denied job of commercial representative, in part because the employer felt that if they became pregnant they could not perform job). Jobs which are part of a promotional ladder in the company are denied women because it is assumed they lack long term job commitment, and the promotions themselves are not forthcoming for the same reason.

account for the lesser status of women in the work force, it is difficult to believe that Congress, when it passed Title VII in 1964 and reiterated, in amending Title VII in 1972, that "discrimination against women is to be accorded the same degree of social concern given to any type of unlawful discrimination" (H.Rep. No. 92-238, 92nd Cong., 1st Sess., p. 5 (1971), did not intend to proscribe *any* employment practices relating to women who bear children particularly. For if that was its intent, the goal of Title VII with regard to sex discrimination, providing "equal opportunity in employment for women," (Equal Employment Opportunity Commission, *Legislative History of Titles VII and XI of the Civil Rights Act of 1964*, p. 3225 (remarks of Rep. Kelly)) would remain perpetually out of reach.

Yet, petitioner here asserts that *Gilbert, supra,* stands for precisely that proposition. *Gilbert* held, the Company asserts, that "*any* personnel policy which excludes pregnancy from coverage but in all other respects treats women and men equally is not in itself discrimination based on sex." (Br. for Petitioner at 14 (emphasis supplied); see also *id.*, at 16, 24).

It is plain that *Gilbert* does not stand for any such broad proposition. Relying upon *Geduldig* v. *Aiello*, 417 U.S. 484, *Gilbert* simply held that where an " 'insurance program which does not exclude anyone from benefit eligibility but merely removes one physical condition—pregnancy—from the list of compensable disabilities' * * * exclusion of pregnancy from coverage * * * is not itself discrimination based on sex." *Gilbert, supra,* ....., U.S., at ....., 45 U.S.L.W., at 4033, 4034. But this conclusion was based not on the supposition that discrimination based on pregnancy or childbirth is *never* a sex-based classification but, rather, on the

quite different proposition that "not * * * *every* * * * classification concerning pregnancy is a sex-based classification." (*Geduldig, supra,* 417 U.S., at 496 n.20 (emphasis suppiied), quoted in *Gilbert, supra.* 45 U.S.L.W., at 4033.)

That *Gilbert,* and *Geduldig,* were narrow decisions not applicable to policies depriving women who bear children of fundamental employment perogatives is shown by the degree to which both opinions stress the importance of insurance principles to the results reached. In *Geduldig,* for example, the Court noted that the contribution rate bore "a close and substantial relationship to the level of benefits payable and to the disability risks insured under the program," (417 U.S., at 493) and consequently refused to require the state "to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has." *Id.,* at 496. And, in *Gilbert* the Court emphasized the similarities of the California insurance scheme it had analyzed in *Geduldig* to the private disability insurance plan then before it. General Electric, it found, was "in effect, acting as an insurer, just as the State of California was acting in *Geduldig.*" (..... U.S., at ....., n. 16, 45 U.S.L.W., at 4035, n. 16). The Court, in particular, looked in *Gilbert* at the "selection of risks covered by the Plan" and concluded that the Plan "is nothing more than an insurance package, which covers some risks, but excludes others." ..... U.S., at ....., 45 U.S.L.W., at 4034-4035.

This analysis, founded on actuarial principles, is appropriate to a disability insurance plan. But such an analysis has no application to a determination of the validity of the employment policy concerning pregnancy involved in this case. For, the Company's totally disparate treatment of

pregnancy here has nothing to do with the actuarial risk analysis underlying *Gilbert* and *Geduldig.* Rather, the seniority rule here at issue affects the employment relationship permanently and fundamentally, rather than temporarily and tangentially. While petitioner, in order to characterize this case as controlled by the actuarial approach of *Gilbert,* refers to *all* its employment practices regarding pregnancy as merely excluding pregnancy coverage from particular "benefits," the notion that a woman who loses her seniority and, along with her job, has merely been excluded from a "benefit" is absurd.

Moreover, even if *Gilbert* stands for the broader proposition that it does not ordinarily violate Title VII to treat a pregnancy-related disability differently from other disabilities, that case certainly does not suggest that an employer can treat pregnancy, childbirth, and the post-natal period as not involving disabilities at all but, instead, as a time when a woman is likely to be and ought to be at home tending to herself and her family. (*See* Part I, *supra*). This Court, in *Gilbert,* in fact *adopted* the district court's finding in *Gilbert* that "normal pregnancy, while not necessarily either a 'disease' or an 'accident,' *was* disabling for a period of six to eight weeks," (..... U.S., at ....., 45 U.S.L.W., at 4032 (emphasis supplied) and proceeded to decide merely that "gender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive." (..... U.S., at ....., 45 U.S.L.W., at 4035). Thus, *Gilbert* is completely uninformative upon whether an employer may, as here, treat the period surrounding childbirth not at all as a particular kind of disability period but, instead, as a break in employment not due to disability.

Finally, there is an even more fundamental reason why

Gilbert cannot stand for the broad proposition which petitioners state. *Gilbert* was decided expressly under § 703 (a)(1) of Title VII, and relied heavily upon the language of that section. Section 703(a)(1) declares it an unlawful employment practice for an employer:

> ". . . to *discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." (Emphasis supplied.)

Indeed, the very premise of the *Gilbert* decision is that *Geduldig* was dispositive with regard to § 703(a)(1) because "to discriminate" must be interpreted in a manner parallel to court decisions construing the Equal Protection Clause. (..... U.S. at .....; 45 U.S.L.W., at 4033-4034).

However, the term "discriminate," upon which *Gilbert* heavily relies, is nowhere used in § 703(a)(2) of Title VII.[21] And here, Ms. Satty charges that Petitioner's employment practices regarding pregnancy and early motherhood violate *both* sections 703(a)(1) and 703(a)(2) of Title VII. Ms. Satty's complaint avers that "[t]he • • • practices of Defendant are in violation of Section 703, Title VII," and alleges that "the policies and practices pursued by the defendant • • • limit, segregate, [and] classify • • • the female workers at Nashville Gas Company in ways which

[21] Section 703(a)(2) declares it an unlawful employment practice for an employer to:

> "limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex or national origin."

• • • the said female workers of employment opportunities [and] otherwise adversely affect their status as employees because of their sex in violation of Title VII." (App. 4, 6). This language makes clear that the allegation was not merely that the pregnancy policies "discriminate" against women under § 703(a)(1) but, in addition, that they are based upon a classification affecting employment opportunities and status because of sex, under § 703(a)(2).

The careful recognition throughout the *Gilbert* opinion that only § 703(a)(1) was being construed (see, e.g., ... U.S., at ....., n.15, 45 U.S.L.W., at 4034, n.15) presumably reflected in part the fact that the disability plan exclusion there at issue was never even *alleged* to violate § 703(a)(2). But this was not a mere pleading error: it is hard to see how exclusion of one disability risk from an insurance plan precludes any employee from any employment opportunities or otherwise affects his or her status as an employee. The direct effect of such an exclusion is the only loss of income for a period one is not at work; such an exclusion has no predictable effect upon either future opportunities or job status.

Here, however, there can be no dispute that the policies applied to women who bear children *do* classify employees in a way which *both* deprives them of employment opportunities and adversely affects their status as employees. For, it was stipulated in this case that, as a result of the loss of competitive seniority, Ms. Satty lost several jobs she was qualified for and would have obtained had she retained her accumulated seniority. (App. 33). And it is apparent, as explained in Part I, that the loss of accumulated competitive seniority will have continuing effects on the employment opportunities of even those few affected women who

do return to permanent positions. Those women will continue to lose the right to promotions they would otherwise obtain and be in danger of lay-offs they could otherwise survive. Further, as also explained in Part I, loss of accumulated competitive seniority entails surrendering to another the most prized aspect of job status available in companies which follow the seniority principle. Indeed, since seniority is a status acquired by one's *past* efforts, loss of seniority involves a loss of a valued right already earned.[22] Thus, it is clear that *Gilbert* cannot be controlling in this case, since it construed only one subsection of Title VII, while another was both alleged here in the complaint and pertinent to the issues at hand.

2. The question, then, is whether the seniority principle applied by the Company to women who become pregnant is one which "in any way * * * deprive[s] or tends to deprive [women] of employment opportunities or adversely affect [women's] status as employees because of * * * sex." If so, there would be a clear violation of § 703(a)(2).

This Court has previously explained that an entirely *neutral* employment policy which has a disparate impact

[22] It is, in fact, certain that Congress, in enacting Title VII, while careful to preserve in effect seniority systems based upon neutral, non-discriminatory principles (see § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h)), intended to prohibit seniority systems in which race, color, religion, sex or national origins were *directly* relevant to one's status within the system. "If [a] seniority rule itself is discriminatory, it would be unlawful under Title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title." (110 Cong. Rec. 7207 (1964), quoted in *Franks* v. *Bowman Trans. Co.*, 424 U.S. 747, 760.)

upon a protected class can in certain circumstances violate § 703(a)(2) if it is not justified by a business necessity. *Griggs* v. *Duke Power Co.*, 401 U.S. 792. If this is so, then the seniority policy of the Company, based not on a neutral principle but on a directly gender-linked stereotype, must also violate that subsection.

Here, there are three related factors which demonstrate that the employment policy is not based on a neutral classification but, instead, on one directly gender-linked. First, the classification principle is such that, by definition, only women can be within the deprived class. Second, this is so because of the most fundamental aspect in which women differ from men—their capacity to bear children. And third, the use of the pregnancy classification with regard to job-bidding seniority is, as illustrated previously, the direct result of an antiquated view of the role of women generally [23] and their domestic responsibilities.

Given these circumstances, it appears plain that if § 703(a)(2) reaches the *Griggs* situation, where a mere *disparate* effect results from a *neutral* employment policy, it necessarily reaches the situation where a much more pronounced and direct-gender linked effect occurs because of a *non-*

[23] Further, the policy has at least indirect *effects* on the careers of all women. For a large majority of women do bear children at some time; and even those who do not are likely to be affected in their career prospects by the knowledge that they are, as long as they *could* bear children, in effect receiving less security for their present work than men. In addition, as noted previously, the very fact that most women will bear children becomes, where a policy of forced discontinuity of employment is in effect for those who do, a factor which justifies for employers a reluctance to place woman in responsible positions where continuity is important. (See n....., *supra*).

neutral employment policy, with potential impact upon the *entire* protected class.

It is instructive, in this regard, to consider recent equal protection cases concerning gender-based discrimination, since *Gilbert* declared such cases useful in construing Title VII. These cases declare the general principle that where a policy is based upon "outdated misconceptions concerning the role of females in the home rather than in the marketplace," policy makers must "choose either to realign their substantive laws in a gender-neutral fashion, or * * * adopt procedures for identifying those instances where the sex-centered generalization actually comported to fact. See, e.g., *Stanley* v. *Illinois* [405 U.S. 645]; cf. *Cleveland Board of Educ.* v. *LaFleur,* 414 U.S. 632." *Craig* v. *Boren,* ..... U.S. ....., ..., 45 U.S.L.W. 4057, 4059.[24]

In particular, the equal protection cases have declared that a "gender-based generalization cannot serve to justify the denigration of the [employment] efforts of women" who do not conform to the generalization, even where that generalization "is not entirely without empirical support." *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 645. See also *Califano v. Goldfarb,* .....U.S. ....., 45 U.S.L.W. 4237. If it is a violation of equal protection to adopt a policy which "results in the efforts of female workers producing less protection for their families than is produced by the efforts of men" (*Weinberger, supra,* 420 U.S., at 645), it must also be such a violation to adopt a policy which results in

[24] The citation of *LaFleur* in *Craig* is particularly pertinent here. For in *LaFleur,* the gender-related stereotype was applied in a policy which directly affected only women who became pregnant. See also *Turner* v. *Department of Employment Security,* 424 U.S. 44.

less protection for the women *themselves,* as the seniority policy here does. And, as noted, the policy here *is* based precisely upon a refusal to recognize that the notion that women will remain out of work due to childbirth to attend to domestic responsibilities, rather than simply for the period they are disabled, does not apply to all women.

Thus, the equal protection cases to which *Gilbert* refers us support the proposition here asserted: that it is necessarily a violation of § 703(a)(2) to adopt a policy which is based upon a gender-related stereotype and which affects a group which is necessarily totally female.[25] And, while the equal protection cases do recognize that gender-based discrimination can be justified by "important governmental objectives * * * [if] substantially related to achievement of those objectives," (*Craig, supra,* ..... U.S., at ....., 45 U.S.L.W., at 4059), no justification whatever has been state for the seniority deprivation here. In fact, the seniority policy here, as explained in Part I, is contrary to the Company's *own* economic and efficiency interests and could result in an out-of-pocket *loss* to the company, without any gain whatever. The Company's defense here, which amounts to the assertion that it may treat women who bear children in any way it chooses, would not prevail even in an equal

[25] Indeed, given the fact that a majority of women are *directly* affected by policies concerning pregnancy, the gender-based violation is even more clear than in *Weinberger.* For in that case only a relatively small subgroup of women was likely to actually be affected—those who die and leave dependent children. Clearly, the fact that a policy based on a gender-related stereotype affects only part of the female population does not render it any less gender-based discrimination. Cf. *Phillips* v. *Martin-Marietta Corp.,* 400 U.S. 542.

protection case in which only a rational basis test were applied, and it cannot therefore prevail here, where a more stringent rule applies.[26]

III. The Company's Refusal To Allow Women Who Bear Children To Use Accumulated Sick Leave For Disabilities During The Childbirth Period Violates Title VII.

The sick leave policy at issue here may, on first glance, appear to be similar enough to the *Gilbert* situation that the analysis in the previous section would not apply. It is our contention, however, that at least for this employer, the interrelationship between the sick leave policy and the seniority policy is so clear that if, as we contend, the seniority policy violates § 703(a)(2), the sick leave policy does also.

To see why this is so, it is useful, first, to illuminate ways in which the Company's sick leave policy does differ significantly from that in effect in the General Electric Company. As Nashville Gas describes its own system, it "does not have any disability insurance plan." (App. 13). Rather, employees *earn* a given number of sick leave days to use in the future, depending upon how long they remain continuously employed, and how often they use sick leave while employed. (See Part I, *supra*).

As a result of this scheme, if women were permitted to use accumulated sick leave for all absences caused by preg-

[26] Section 703(e), which permits gender-based discrimination in employment where sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business" would, in our view, be the only appropriate defense to discrimination which, as here, is based on a gender-based stereotype. No such defense has been asserted, nor can we imagine how, on this record, such a defense could prevail.

nancy-related disabilities, there is no meaningful sense in which they could be said to have received a benefit *additional* to that accorded men and women who do not become pregnant. For, sick days, once used, are forever expended, and cannot be used again should a new disability occur. For example, if a woman uses all her accumulated sick leave to cover a pregnancy-related disability, she would have no days left that year should she later break her leg and be unable to work; while a man similarly situated except for the fact that he is not subject to the risk of pregnancy would have sick days available to assure income if he broke his leg.

Under the General Electric plan, the situation would be quite the opposite: because there is no absolute limit upon the number of sick days which may be taken in one year but, rather, only upon the number of days for which disability will be paid for a single disability (see ..... U.S. at ....., 45 U.S.L.W., at 4032), the woman described above *could* receive benefits for *two* disability periods, while the man would receive benefits only for one. Thus, while there is in sense in which covering pregnancy in the *Gilbert* situation entails an *extra* benefit for women, no such *extra* benefit would be conferred under the employer's scheme here.

Moreover, in the General Electric Company, since the payments available for disability are not limited except with respect to each disability period, they are not a reward for successfully completed past service. Here, the limits themselves are set primarily in accord with the length of past service, so that sick leave is a form of deferred compensation allocated in accord with the amount of time worked.

For these reasons, the Company's sick leave policy must be regarded as part of, rather than separate from, its policy

of stripping women who bear children of competitive job seniority. For, all employees of the Company who receive sick pay while disabled *also* retain job-bidding seniority and, indeed, are ordinarily returned to their last job; while all employees who are on personal leave without pay *lose* job bidding seniority, and their right to sick leave pay while on leave. Thus, the right to be paid for days not worked due to disability is a direct concommitant, in this Company, of the seniority system, both in terms of how many days pay will be allowed and in terms of whether the person is considered to be in active employment or on a leave status.

From this analysis, it becomes plain that the same gender-based stereotype which accounts for depriving women who bear children of competitive job seniority also underlies the sick leave policy. Nashville Gas denies sick benefits during "pregnancy" leave not because it has chosen to exclude one kind of disability risk from its income protection plan, but because it has refused to regard the childbirth period as one which, for some women at least, is nothing more than a disability period.

Whether or not the Company could decide, for gender-neutral reasons, to simply exclude all pregnancy disabilities from the sick leave program is therefore not the issue here. For the declared company policy is to pay sick leave to all persons, up to prescribed limits based on past service, who are unable to work due to disability while on active service. Women on "pregnancy" leave are excluded from that policy because they are, due to the seniority policy which, in our view, violates § 703(a)(2), not in active service, and not because of the nature or cost of their particular disability. Therefore, the denial of sick leave is simply part of the

§ 703(a)(2) violation and must be proscribed along with the rest.[27]

[27] Indeed, as noted, the Company does not deny such pay to women for pregnancy related disabilities *until* they are placed on "pregnancy" leave and therefore, because of the deprivation of their jobs and of job-bidding seniority, no longer on active service.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

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